

THE UNITED STATES OF AMERICA

DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

WASHINGTON, D. C.

1914

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 520

FRED G. DRUMMOND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE TENTH CIRCUIT

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[fol. a]

[Caption omitted]

[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN DISTRICT OF OKLA-
HOMA**

No. 805. Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

FRED G. DRUMMOND, Defendant

COMPLAINT—Filed April 29, 1942

Comes now the above-named plaintiff, the United States of America, by its undersigned attorney, Whit Y. Mauzy, the duly appointed, qualified and acting United States Attorney in and for the Northern District of Oklahoma, who brings, files and prosecutes this action in this court at the special direction of the Attorney General of the United States of America and at the request of the Secretary of the Interior of the United States, for and on behalf of the United States and for and on the further behalf of George Pitts, Osage Allottee No. 761, who resides in Osage County, State of Oklahoma, Northern District of Oklahoma, and within the jurisdiction of this court, and alleges and states:

I

That the defendant, Fred G. Drummond, is a resident of Osage County, State of Oklahoma.

II

That jurisdiction is vested in this court under Revised Statutes, Sections 563 and 629 and amendments thereto, now being Section 41, Title 28, U. S. C. A., and under Section 274-d, Chapter 512, 48 Stat. L. Page 955, as amended.

III

Plaintiff further alleges and states that George Pitts, [fol. 2] Osage Allottee No. 761, is a full blood, restricted

member of the Osage Tribe of Indians, whose property has been at all times within the jurisdiction and under the care, protection, supervision and control of the United States and, pursuant to acts of Congress, the United States has at all times herein mentioned, had the supervision and control of the lands herein described.

IV

That said Osage Tribe of Indians was originally the owner of all the lands situated in Osage County, Oklahoma, which was formerly the Osage Indian Reservation under and by virtue of certain acts of Congress and treaties as follows:

Act of July 15, 1870, (16 Stat. L. 335).
 Act of July 5, 1872, (17 Stat. L. 228).
 Act of March 3, 1873, (17 Stat. L. 530).
 Act of March 3, 1883, (22 Stat. L. 603).
 Act of March 2, 1899, (30 Stat. L. 990).
 Act of June 28, 1906, (34 Stat. L. 539).
 Act of March 3, 1929, (41 Stat. L. 1249).
 Act of March 2, 1929, (45 Stat. L. 1479).
 Act of June 24, 1938, (53 Stat. L. 1034).

and by deed to said Osage Tribe executed on behalf of the Cherokee Indians on June 14, 1883, pursuant to acts of Congress above referred to, to-wit:

Act of March 3, 1873 and Act of March 3, 1883.

V

Plaintiff further alleges that during his lifetime the said George Pitts married Mamie Fletcher Pitts and was her surviving husband at the date of her death on or about the 24th day of May, 1937. That the said Mamie Fletcher Pitts was a duly enrolled and allotted member of the Osage Tribe of Indians, being enrolled opposite number 156, and is shown by the official roll of the Osage Tribe of Indians to have been born on June 1, 1876, and to have been a full blood member of said tribe.

[fol. 3]

VI

Plaintiff further alleges that as such Osage allottee the said Mamie Fletcher Pitts was the owner at the time of her death of certain lands allotted to her as a member of the

Osage Tribe and that she had acquired, by inheritance from deceased relatives who were themselves members of the Osage Tribe, or by partition among members of the Osage Tribe, certain lands hereinafter set out.

VII

Plaintiff further shows that at no time during her life did the Secretary of the Interior ever issue to the said Mamie Fletcher Pitts a certificate of competency authorizing her to sell or convey any of her lands, and this plaintiff alleges the fact to be that at no time during her life could the said Mamie Fletcher Pitts alienate or encumber any of the lands hereinafter described, without the written consent of the Secretary of the Interior.

VIII

Plaintiff further alleges that the said Mamie Fletcher Pitts died on or about the 24th day of May, 1937, seized and possessed of all the lands hereinafter described, and that her estate was duly probated in the County Court of Oklahoma in probate cause number 4347, and that on the 9th day of September, 1938, said County Court of Osage County found and determined the heirs of the said Mamie Fletcher Pitts, and entered its order determining, adjudging and decreeing that George Pitts, ~~her~~ husband, succeeded and inherited from the said Mamie Fletcher Pitts the following described lands, to-wit:

An undivided $\frac{1}{4}$ th interest in:

Southwest Quarter of Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$);

Northwest Quarter of Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$)

South Half of Southeast Quarter ($S\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 26, Township 28, Range 6;

Lots 3 and 4;

South Half of Northwest Quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 3, Township 24, Range 4;

West Half of Southeast Quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$);

West Half of Northeast Quarter of Southeast Quarter ($W\frac{1}{2}$ of $NE\frac{1}{4}$ of $SE\frac{1}{4}$);

West Half of Southeast Quarter of Southeast Quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 31, Township 26, Range 6;

Lots 1 and 2;

South Half of Northeast Quarter ($S\frac{1}{2}$ of $NE\frac{1}{4}$) of Section 1;

South Half of Northwest Quarter of Southwest Quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$ of $SW\frac{1}{4}$);

North Half of North Half of Northeast Quarter of Southwest Quarter ($N\frac{1}{2}$ of $N\frac{1}{2}$ of $NE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 2, Township 20, Range 10;

An undivided $1/12$ th interest in:

Northwest Quarter ($NW\frac{1}{4}$) of Section 32, Township 20, Range 6;

East Half of Northeast Quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$);

Southwest Quarter of Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$);

Southeast Quarter of Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 33, Township 25, Range 4;

Southeast Quarter ($SE\frac{1}{4}$) of Section 9, Township 20, Range 6;

Southwest Quarter ($SW\frac{1}{4}$) of Section 1;

North Half of Northeast Quarter of Southeast Quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$ of $SW\frac{1}{4}$);

North Half of South Half of North Half of Northeast Quarter of Southwest Quarter ($N\frac{1}{2}$ of $S\frac{1}{2}$ of $N\frac{1}{2}$ of $NE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 2, Township 20, Range 10;

North Half of Southeast Quarter ($N\frac{1}{2}$ of $SE\frac{1}{4}$);

Southeast Quarter of Southeast Quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 7, Township 23, Range 8;

[fol. 5] Northwest Quarter of Northeast Quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 23, Township 24, Range 8;

Lots 3 and 4 and 5;

Southeast Quarter of Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 6;

North Half of Northeast Quarter of Northwest Quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 17, Township 20, Range 9;

North Half of Northeast Quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$);

North Half of Northwest Quarter ($N\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 28;

Northeast Quarter of Southwest Quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$);

North Half of Southeast Quarter ($N\frac{1}{2}$ of $SE\frac{1}{4}$);

Southeast Quarter of Southeast Quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 21, Township 23, Range 6;

North Half of Northeast Quarter ($N\frac{1}{2}$ of $NE\frac{1}{4}$);

Southwest Quarter of Northeast Quarter (SW $\frac{1}{4}$ of NE $\frac{1}{4}$);
 Northeast Quarter of Northwest Quarter (NE $\frac{1}{4}$ of NW $\frac{1}{4}$)
 of Section 16, Township 23, Range 6;
 Southeast Quarter (SE $\frac{1}{4}$) of Section 2, Township 24,
 Range 4;
 Lots 6 and 7 and 8, Block 5, Tall Chief Addition to Town
 of Fairfax, Oklahoma.

IX

That prior to said date, said lands had been in the possession of the administrator of said estate; that subsequent to the issuance of said order, possession of said above-described real estate was turned over to the heirs at law of Mamie Fletcher Pitts, deceased.

X

Plaintiff further alleges that on or about the 11th day of July, 1910, the Secretary of the Interior of the United States issued to the said George Pitts a certificate of competency, authorizing the said George Pitts to sell and convey [fol. 6] any of the lands allotted to him as surplus lands. That said Certificate of Competency remained in full force and effect until the 24th day of June, 1938, when the same was, by order of the Secretary of the Interior of the United States, revoked, and the said George Pitts is now and has been ever since said date, what is commonly known and referred to as a restricted Osage Indian.

XI

Plaintiff further alleges that on the 12th day of July, 1937, the said George Pitts made, executed and delivered to the defendant, Fred G. Drummond, a purported promissory note in writing for the principal sum of \$2,500.00 due and payable twelve (12) months after date and to secure the re-payment thereof did make, execute and deliver to the defendant, Fred G. Drummond, a purported real estate mortgage covering all of his undivided interest in and to the lands described in paragraph VIII above. A copy of said mortgage is attached hereto, marked Exhibit "A" and made a part hereof as fully as though set out herein.

XII

Plaintiff further alleges that the said George Pitts failed and refused to pay said mortgage when the same became

due, and thereafter, and on the 24th day of October, 1939, the defendant, Fred G. Drummond, instituted an action in the District Court of Osage County, State of Oklahoma, against the said George Pitts, being numbered 17,234, for a money judgment on said note and to foreclose said mortgage and quiet title to the lands therein described, and for a reformation of said mortgage; that said George Pitts duly and within the time allowed by the statutes of Oklahoma and the court, attempted to defend said suit, alleging that he was without power, right or authority to in any way alienate or encumber the lands inherited by him from his deceased, full blood, restricted Osage Indian wife, and that said mortgage was invalid and did not convey, assign or set over to the plaintiff any right, title, interest, estate or equity in any of the lands described therein, and that said mortgage was, as to said lands, null and void and without any legal force or effect; that said mortgage has never been approved by the Secretary of the Interior.

[fol. 7] Plaintiff further shows that on the 9th day of February, 1941, said District Court of Osage County, in said cause, made and entered its order of judgment finding and determining that the said George Pitts was indebted to the said Fred G. Drummond in the sum of \$2,500.00, with interest, costs and attorney fees, and did enter its decree of foreclosure of the mortgage therein referred to and sued upon.

Plaintiff further shows that an appeal was taken from said judgment by the said George Pitts to the Supreme Court of the State of Oklahoma, but that on the 6th day of May, 1941, the said Supreme Court of Oklahoma affirmed the judgment of the District Court of Osage County and did, thereafter and on the 4th day of November, 1941, issue its mandate to the District Court of Osage County, Oklahoma, directing said court to carry out and execute the terms of its decree and judgment.

Plaintiff further shows to the court that thereafter said George Pitts attempted to appeal said case to the Supreme Court of the United States, but that said Supreme Court of the United States, on the 2nd day of March, 1942, denied a petition for a writ of certiorari.

XIII

Plaintiff further shows to the court that there is here involved an interpretation of certain statutes of the United

States relating to Osage Indians. That no question of the proper interpretation of the laws of the State of Oklahoma is involved but purely a question of the correct and proper interpretation of the lands of the United States relating to Osage Indians.

XIV

Plaintiff further alleges that on the 18th day of April, 1912, the President of the United States approved an act of the Congress which provides in Section 7 thereof as follows, to-wit:

“That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to [fol. 8] any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under — of the county court of Osage County, State of Oklahoma: Provided further That nothing herein shall be construed so as to exempt any such property from liability for taxes.”

And thereafter, and on February 27, 1925, the President of the United States approved an act of the Congress, Section 3 of which provides as follows, to-wit:

“Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.”

XV

Plaintiff further shows to the court that the Supreme Court of Oklahoma has mis-construed said Acts of Congress in that the Supreme Court of the State of Oklahoma in the case of *Pitts v. Drummond*, No. 29,859 did declare the law to be as follows, to-wit:

"All restrictions on the alienation of lands inherited by Osage Indians who hold certificates of competency were removed by the provisions of section 6 of the Act of Congress approved April 18, 1912 (37 Stat. 86)."

"That portion of section 7 of the Act of Congress approved April 18, 1912, which provides that no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir to the time which lands and [fol. 9] moneys are turned over to such heirs does not apply to the restricted lands of such deceased allottee and which are not assets in the hands of his administrator for the payment of debts."

"Section 3 of the Act of Congress approved February 27, 1925 (43 Stat. 1008), imposing restrictions on inherited lands of certain Osage Indians does not purport to restrict the alienation of such lands belonging to Osages who hold certificates of competency."

XVI

Plaintiff further shows that acting upon said misconstruction of the law by said Supreme Court, the defendant herein, Fred G. Drummond, has caused a special execution and order of sale to issue out of the office of the Clerk of the District Court of Osage County to sell the lands herein described, and that unless prevented by this court he will, on or about the 4th day of May, 1942, at the hour of two o'clock on said day, at the East front door of the court house in the City of Pawhuska, offer for sale and sell to the highest bidder for cash, the property herein described.

XVII

Plaintiff further alleges that the sale of said property under the facts as aforesaid, would cause this plaintiff irreparable harm and injury in carrying out the policies of the plaintiff in relation to its Indian wards. That it has no ade-

quate remedy at law and that unless the defendant is enjoined and restrained, he will, on or about the 4th day of May, 1942, sell said lands to the irreparable damage of the plaintiff, and the said George Pitts.

XVIII

Plaintiff further alleges that the foreclosure of said mortgage is unlawful and contrary to the letter and spirit of the Acts of Congress above referred to, and that the action of the defendant in attempting to sell said lands is unlawful and illegal and contrary to the laws of the United States that said mortgage made and executed by the said George Pitts is invalid and without any force or effect and did not and does not vest the defendant herein with any [fol. 10] right, title, interest or equity in and to said lands, and that said mortgage should be, by this court, set aside and determined to be a cloud upon the title of the said George Pitts.

Wherefore, plaintiff demands that the court upon a full and complete hearing, find and determine that said George Pitts was without any right, power or authority to mortgage or otherwise alienate or encumber said lands without the consent in writing of the Secretary of the Interior and that this court further find and determine that said aforementioned mortgage was invalid and that the same conveyed to the defendant, Fred G. Drummond, no right, title, equity or interest in and to the said lands and that title to said lands be quieted in the said George Pitts and that the said Fred G. Drummond be restrained and enjoined from attempting to sell said lands or interfering with the possession of George Pitts in any manner whatsoever and that the plaintiff recover its costs.

Whit Y. Mauzy, United States Attorney, 335 Federal Building, Tulsa, Oklahoma. Attorney for Plaintiff.

[File endorsement omitted.]

EXHIBIT "A" TO COMPLAINT

Real Estate Mortgage

Know All Men by These Presents: That George Pitts, a single person, of Osage County, Oklahoma, party of the first part, has mortgaged and hereby mortgage- to Fred G. Drummond, party of the second part, the following described premises, situated in Osage County, State of Oklahoma, to-wit:

My undivided interest in the following: SW $\frac{1}{4}$ of NE $\frac{1}{4}$, & NW $\frac{1}{4}$ of SE $\frac{1}{4}$, & S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 26, Twp. 28, R. 6; and Lots 3 and 4 & S $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 3, Twp. 24, R. 4; and SE $\frac{1}{4}$, less E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 31, Twp. 26, R. 6; and Lots 1 and 2, & S $\frac{1}{2}$ of NE $\frac{1}{4}$ Sec. 1, and S $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, & N $\frac{1}{2}$ N $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 2, Twp. 20, [fol. 11] R. 10, and NW $\frac{1}{4}$ of Sec. 32, Twp. 29, R. 6; and E $\frac{1}{2}$ of NE $\frac{1}{4}$, & SW $\frac{1}{4}$, of NE $\frac{1}{4}$ & SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 33 Twp. 25, R. 4; and SE $\frac{1}{4}$ of Sec. 9, Twp. 25, R. 6; and SW $\frac{1}{4}$ of Sec. 1, & N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, & N $\frac{1}{2}$ S $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 2, Twp. 20, R. 10; and N $\frac{1}{2}$ of SE $\frac{1}{4}$ & SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 7 Twp. 23, R. 8; & NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 23, Twp. 24, R. 8; and Lots 3 and 4 and 5, & SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 6, & N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 17, Twp. 21, R. 9; and N $\frac{1}{2}$ of NE $\frac{1}{4}$, & N $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 28, & NE $\frac{1}{4}$ of SW $\frac{1}{4}$, & N $\frac{1}{2}$ of SE $\frac{1}{4}$ & SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 21, Twp. 23, R. 6; and N $\frac{1}{2}$ of NE $\frac{1}{4}$, & SW $\frac{1}{4}$ of NE $\frac{1}{4}$ & NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 16, Twp. 23, R. 6; and SE $\frac{1}{4}$ of Sec. 2, Twp. 24, R. 4; and Lots 6 and 7 and 8 in Blk. 5 of Tall Chief Addition to town of Fairfax, Oklahoma,

with all improvements thereon and appurtenances thereunto belonging, and warrant the title to the same.

This mortgage is given to secure the payment of the principal sum of Twenty-five hundred and no/100 dollars, with interest thereon at the rate of 10 per cent per annum, payable annually from mty. according to the terms and at the time and in the manner provided by a certain promissory note of even date herewith, given and signed by the makers hereof, and payable to the order of the mortgagee herein at Hominy Oklahoma.

It Is Expressly agreed and understood by and between the said parties hereto that this mortgage is a first lien

upon said premises; that the party of the first part will pay said principal and interest at times when the same fall due and at the place and in the manner provided in said notes and will pay all taxes and assessments against said land when the same are due each year; and will not commit or permit any waste upon said premises; that building and other improvements thereon shall be kept in good repair and shall not be destroyed or removed without the consent of the second party, and shall be kept insured for the benefit of the second party, and shall be kept insured for the benefit of the second party or its assigns, against loss by fire or lightning for not less than \$—— in form and companies satisfactory to said second party, and that all policies and renewals receipts shall be delivered to said second party. If the title to the said premises be transferred, said second party is authorized, as agent of [fol. 12] the first party, to assign the insurance to the grantee of the title.

It is further agreed and understood that the said second party may pay any taxes and assessments levied against said premises or any other sum necessary to protect the rights of such party or assigns, including insurance upon buildings, and recover the same from the first party with ten per cent interest, and that every such payment is secured thereby, and that in case of a foreclosure hereof and as often as any foreclosure suit may be filed, the holder hereof shall recover from the first party an attorney fee of \$25.00 and ten per cent upon the amount due, or such different sum as may be provided for by said notes, which shall be due upon the filing of the petition in foreclosure and which is secured hereby, together with expense of examination of title in preparation for foreclosure. Any expense incurred in litigation or otherwise, including attorney fees and abstract of title to said premises incurred by reason of this mortgage or to protect its liens, shall be repaid by the mortgagor to the mortgagee or assigns, with interest thereon at ten per cent per annum, and this mortgage shall stand as security therefor.

And it is further agreed that upon a breach of the warranty herein or upon a failure to pay when due any sum, interest or principal, secured hereby, or any tax or assessment herein mentioned, or to comply with any requirements herein or upon any waste upon said premises, or any removal or destruction of any building or other im-

provements thereon, without the consent of said second party, the whole sum secured hereby shall at once and without notice become due and payable at the option of the holder thereof and shall bear interest thereafter at the rate of ten per cent p-r annum, and the said party of the second part or its assigns shall be entitled to a foreclosure of this mortgage and to have the said premises sold, and the proceeds applied to the payment of the sum secured hereby; and that immediately upon the filing of the petition in foreclosure the holder hereof shall be entitled to the possession of said premises, and to collect and apply the rents thereof, less reasonable expenditures, to the payment of said indebtedness, and for this purpose the holder hereof shall [fol. 13] be entitled to a receiver, to the appointment of which the mortgagors hereby consent, and the holder hereof shall in no case be held to account for any rental or damage other than for rents actually received; and the appraisal of said premises is hereby expressly waived or not at the option of the holder of this mortgage.

In construing this mortgage the words 'first party and second party' wherever used shall be held to mean the persons named in the preamble as parties hereto.

Dated this 12 day of July, 1937.

George Pitts.

Signed in the presence of — — —.

E. E. Mtg. Tax \$2.50. paid this date 7-14-37, Livingston Hall, County Treasurer.

State of Oklahoma, Osage County, ss. Before me, the undersigned, a Notary Public, in and for said county and state, on this 12 day of July, 1938, personally appeared George Pitts, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth. Witness my hand and official seal the day and year last above written.

Ruth McNulty, Notary Public (Seal). My commission expires Jan. 16, 1940.

Compared, Indexed. 142933. State of Okla. County of Osage, ss. Filed in the office of Register of Deeds for record this 14 day of July, A. D. 1937, at 3:45 o'clock

P.M., and recorded in book 54 of mortgages, on page 628. The within instrument has been compared with the record thereof in this office, and the record there made found correct in every particular, and the same has been properly indexed, in accordance with the laws of Oklahoma. Jeff F. Kendall, Co. Clerk. D. Farris, Deputy.

[fol. 14] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 25, 1942

Comes now Fred G. Drummond and for answer to the complaint of the plaintiff alleges and states:

1. That the complaint of the plaintiff is subject to a motion to dismiss for the reason that the questions raised have already been fully and finally adjudicated but the defendant chooses to answer so as to set out all the facts concerning the previous adjudication and to raise the question of prior adjudication by answer.

2. That the defendant is the owner and holder of the note and mortgage mentioned and described in paragraph No. 11 of the complaint and was such owner and holder from the time of the execution of the same and that they were supported by a good and valuable consideration, and that said note was reduced to judgment and decree of foreclosure of said mortgage entered in the district court of Osage county, Oklahoma, on the 9th day of February, 1940, in a suit wherein this answering defendant was plaintiff and George Pitts was defendant.

3. That George Pitts was and is an allotted member of the Osage Tribe of Indians and that he was granted a certificate of competency by the Secretary of the Interior on the 11th day of July, 1910, a copy of which is hereto attached, marked exhibit A and made a part hereof.

4. That Mamie Fletcher Pitts, Osage Allottee No. 156, wife of George Pitts, died intestate on the 24th day of May, 1937, and that her husband, George Pitts, inherited from her the real estate described in the petition of the plaintiff.

5. That on the 12th day of July, 1937, George Pitts, for a good and valuable consideration, made, executed and de-

livered to this answering defendant the note and mortgage hereinbefore referred to.

6. That on the 24th day of June, 1938, the Secretary of the Interior made and issued an order revoking the certificate of competency which had been issued to the said George Pitts on July 11, 1910.

7. That on the 24th day of October, 1939, the said [fol. 15] George Pitts having defaulted in payment of said indebtedness owing to this answering defendant suit was begun in the district court of Osage county, Oklahoma, against the said George Pitts for recovery of judgment on said note and to foreclose said mortgage, the same being case No. 17,234.

8. That the petition in said suit alleges the making of said note and mortgage and default in payment thereof and asked for judgment and foreclosure.

9. Thereafter and on the 8th day of January, 1940, the said George Pitts, by and through his attorneys, Macdonald, Files & Barney, filed an answer in said cause, a copy of which is hereto attached, marked exhibit B and made a part hereof.

10. That this answering defendant filed a reply to said answer on the 18th day of January, 1940, a copy of which is hereto attached, marked exhibit C and made a part hereof; and that on the 9th day of February, 1940, this answering defendant filed an amendment to his reply, a copy of which is hereto attached, marked exhibit D and made a part hereof.

11. That said cause was tried before the district court of Osage county, Oklahoma, and on the 9th day of February, 1940, judgment was rendered on said note and foreclosing said mortgage, to which the said George Pitts by his attorney excepted.

12. That after the conclusion of the taking of the evidence and the argument in said trial before said district court the court made these oral remarks, which are as follows, to-wit:

"The Court: Well, it is my opinion that George Pitts having a certificate of competency and having had it for a long period of years, and the same never having been

revoked and the restrictions reimposed, that he could encumber or alienate this land. I do not think that Section 2 has reference to an Indian with a certificate of competency, no matter what degree of blood he has. It depends altogether upon what our understanding is of what a certificate of competency means and has meant, ever since [fol. 16] the issuance of certificates of competency. I take it all you want is judgment on this note."

13. That on the 10th day of February, 1940, the said George Pitts filed a motion for new trial in said cause and on the 11th day of March, 1940 the said motion for new trial was overruled and the said George Pitts excepted and gave notice of appeal to the Supreme Court of the State of Oklahoma, and duly perfected said appeal and filed said cause in the Supreme Court, the same being styled there George Pitts, Plaintiff in Error v. Fred G. Drummond, Defendant in Error, being case No. 29,859; and that a copy of the petition in error so filed in the Supreme Court of the state of Oklahoma is hereto attached, marked exhibit E and made a part hereof.

14. That on the 26th day of March, 1940, the said George Pitts made and filed in said case then pending in the district court of Osage County, Oklahoma, a supersedeas bond which was approved by the Acting Superintendent of Osage Agency at Pawhuska, Oklahoma, under authority of and from the Secretary of the Interior to so approve said bond. A copy of said bond with said approval thereto is attached hereto, marked exhibit F and made a part hereof.

15. That after said appeal was lodged in the Supreme Court of the state of Oklahoma the said George Pitts filed a brief and a reply brief therein in each of which he contended that the federal statutes quoted in his answer restricted the mortgaged lands against alienation in the hands of George Pitts and that the mortgage was for that reason invalid, as is shown by a copy of the conclusion to the reply brief of George Pitts which is in words and figures as follows:

"Conclusion. For the reasons herein stated, we are firmly of the opinion that the lands inherited by George Pitts from his full-blood wife, Mamie, were and are restricted in his hands and that those lands may not be taken to pay any obligation contracted by George Pitts; that the

remedy of the defendant in error is to present his claim to the Secretary of the Interior for payment in accordance with the provisions of Section 4 of the 1925 Act; that the action of the court in this case in ordering the mortgage [fol. 17] foreclosed was wholly wrong and that the judgment entered in this case should be reversed and the case remanded to the District Court with instructions to dismiss the plaintiff's cause of action and to render judgment quieting the title to this land in the defendant George Pitts."

16. That thereafter and on the 6th day of May, 1941 The Supreme Court rendered its decision which is now reported in 118 P(2d) 244, a copy of which is hereto attached marked exhibit G and made a part hereof.

17. That shortly thereafter the said George Pitts filed in the Supreme Court of the state of Oklahoma, in said cause a petition for re-hearing, a copy of which is hereto attached, marked exhibit II and made a part hereof, and that along with said petition for re-hearing the said George Pitts filed a brief, the conclusion of said brief being in words and figures as follows, to-wit:

"Conclusion. In conclusion let us summarize the argument made in this brief as follows:

1. The probate courts of Oklahoma have a full and complete jurisdiction over the property of deceased Osage Indians under section 3 of the 1912 Act.

2. Under our probate statutes an administrator is entitled to the possession and control of all real estate, except the homestead, until ordered by the court to turn it over to the heirs.

3. Under section 7 of the 1912 Act lands inherited by an Osage Indian may not be taken or sold to satisfy any indebtedness incurred prior to the time the land is turned over to him.

4. Under section 3 of the 1925 Act restrictions were reimposed on the lands inherited by George Pitts, he being of more than one-half degree of Indian blood.

"For all of these reasons we believe the opinion of this court filed May 6, 1941, is incorrect and that the

Petition for a Rehearing should be granted and the judgment of the trial court reversed."

18. That on October 10, 1941, said petition for rehear-[fol. 18] ing was overruled by the Supreme Court of the state of Oklahoma.

19. That thereafter the said George Pitts petitioned the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of Oklahoma in said cause, the file number in the Supreme Court of the United States being No. 901, the petition for said writ having been filed therein on January 26, 1942. There is attached hereto a copy of said petition for writ of certiorari, which is marked exhibit I and made a part hereof.

20. That along with said petition for writ of certiorari there was filed a brief in support of the petition. The specifications of error set out in said brief are in words and figures as follows, to-wit:

"1. That said Supreme Court of the State of Oklahoma erred in affirming the decision of the District Court of Osage County, Oklahoma.

"2. That the Supreme Court of the State of Oklahoma erred in holding that all restrictions on the alienation of lands inherited by Osage Indians who hold certificates of competency were removed by the provisions of Section 6 of the Act of Congress approved April 18, 1912 (37 Stat. L. 86).

"3. That the Supreme Court of the State of Oklahoma erred in holding that Section 7 of the Act of Congress approved April 18, 1912, does not apply to the restricted lands of deceased allottees and which are not assets in the hands of his administrators for the payment of debts.

"4. That the Supreme Court of the State of Oklahoma erred in holding that Section 3 of the Act of Congress approved February 27, 1925 (43 Stat. L. 1008), imposing restrictions on inherited lands of said Osage Indians, does not purport to restrict the alienation of such lands belonging to Osage Indians who hold certificates of competency."

21. The conclusion of said brief of George Pitts file support of said petition for writ of certiorari is in words and figures as follows, to-wit:

"Conclusion. A decision on the merits of this case this court is of vital importance, because:

[fol. 19] 1. Two acts of Congress relating to the administration of Indian affairs have been held inoperative insofar as all Osages similarly situated are concerned.

2. Title to many thousands of acres of land are affected. In examining title to similar lands, a lawyer must choose between two conflicting decisions. If he follows *United States v. Johnson* the land is restricted; but if he follows *Pitts v. Drummond* the land is unrestricted. Thus intolerable conflict regarding land title will prevail. Because an act of Federal Congress is now the subject of a conflict of decisions which cannot be harmonized or reconciled, the court should review the act and the conflicting decisions and end the controversy by its authoritative decision.

"It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that your petitioner may have justice and that a writ of certiorari should be granted, and that the Court should review the decision of the Supreme Court of the State of Oklahoma and finally reverse the same."

22. On March 2, 1942, the Supreme Court of the United States made and entered its order denying the petition for writ of certiorari as is more fully shown by a copy of said order, together with the file marks of the Clerk of the Supreme Court of the State of Oklahoma, showing receipt and filing of said order by the clerk of the Supreme Court of the state of Oklahoma on March 6, 1942, which is attached hereto marked exhibit J and made a part hereof.

23. That the Secretary of the Interior had knowledge through officials of his office of the pendency of said action which was begun in the district court of Osage county, Oklahoma, and of the steps being taken throughout said litigation, and that the Secretary of the Interior authorized and approved the employment of Ralph A. Barney to represent the said George Pitts throughout said litigation, and that the said Ralph A. Barney in pursuance of said employment, represented the said George Pitts throughout said

litigation, and that the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent of the Osage Agency, and the Tribal Attorney of the Osage Tribe of Indians, assisted and cooperated with the said George Pitts and his attorney, Ralph A. Barney, in conducting the defense to said cause of action of this answering defendant and arranged for the payment of said counsel, Ralph A. Barney, for representation of the said George Pitts, from the funds of the said George Pitts which are under the control and supervision of the Secretary of the Interior, and advanced from said funds the necessary costs and expenses of carrying on said litigation.

24. That all questions raised by the complaint of the petitioner herein have been fully and finally adjudicated, and that the plaintiff is estopped from maintaining another suit involving the same cause of action, the same defenses, the same lands, and the same subject-matter, as were involved in the former action.

25. That the said George Pitts having litigated all of those questions in his own proper person they cannot now be litigated again by an agent or trustee for him or in his behalf.

26. That the government does not have capacity to maintain this action for and on behalf of the said George Pitts, he having had a certificate of competency and being an unrestricted Indian at the time the transaction complained of occurred.

27. That the plaintiff is undertaking to maintain this action merely as a representative of the said George Pitts and in his behalf, and in violation of the principles of res adjudicata and estoppel, and that the plaintiff is estopped by the former action from attempting to maintain this one, and that the former action is res adjudicata of all questions raised here.

28. That it has long been the practice of the Secretary of the Interior of the United States of America to approve of the employment of attorneys to represent individual Osage Indians in their litigation, and by section 6 of the Osage Act of February 27, 1925, and by other acts and by general law, such employment is authorized.

29. That in this instance the said Secretary of the Interior did in writing authorize and approve of the employment [fol. 21] ment of Ralph A. Barney to represent the said George Pitts throughout the litigation conducted in the State Courts and before the Supreme Court of the United States, and that the said Ralph A. Barney, in pursuance of said employment, and as the attorney approved by the Department of the Interior, did efficiently, diligently and ably represent the said George Pitts throughout said litigation, and the government cannot now maintain another action in behalf of the said George Pitts involving the same identical questions which have been fully litigated and decided.

Further answering to the merits of the complaint of the plaintiff the defendant alleges:

1. That he incorporates hereinto and makes a part hereof all the allegations heretofore made and all the exhibits heretofore attached as a part of this answer.

2. That section 6 of the Osage Act of April 18, 1912, (37 Stat. 86) by specific terms removes the restrictions against alienation from all lands inherited by a member of the Osage Tribe of Indians who has a certificate of competency by this language:

"When the heirs of such deceased allottees have certificates of competency or are not members of the Tribe, the restrictions on alienation are hereby removed",

and *and* that the said George Pitts had a certificate of competency at the time of the death of his wife, Mamie Pitts, and at the time he inherited the real estate involved in this action.

3. That by other Acts of Congress an Osage Indian who has been granted a certificate of competency has full and complete power to alienate all of his real estate with the exception of his allotted homestead.

4. That this defendant denies that the administrator of the estate of Mamie Pitts ever had actual or constructive possession of the real estate involved in this litigation and states that said real estate descended direct from Mamie Pitts to George Pitts and that the same was not subject to be taken to satisfy debts or expenses of administration of the said Mamie Pitts and descended direct to George

[fol. 22] Pitts and that he was entitled to possession of the same from the time of the death of the said Mamie Pitts.

5. That during the time the said George Pitts had a certificate of competency he was free, able, and competent to transact his own business and to alienate without approval of the Secretary of the Interior any and all of the real estate which he owned or inherited except his own allotted homestead.

6. This answering defendant admits the allegation of paragraph numbered 14 of the complaint.

7. That this defendant did, after his judgment against George Pitts had become final and after the Supreme Court of the United States had refused to review the decision of the Supreme Court of the State of Oklahoma, cause an order of sale to be issued out of the district court of Osage County, Oklahoma, and advertised said mortgaged lands for sale for May 11, 1942, but the plaintiff caused this action to be filed and caused a lis pendens notice to be filed in the office of the County Clerk of Osage County, Oklahoma, giving notice of the pendency of this action and this defendant, therefore, requested the Sheriff of Osage County, Oklahoma, to return said order of sale without holding of said sale and the defendant is now being injured and delayed by the reason of the pendency of this action.

8. That section 4 of the Osage Act of February 27, 1925 (43 Stat. 1008) which authorizes the revocation of a certificate of competency of an Osage Indian by mandatory language requires the payment of the then existing just indebtedness of the member of the Osage Tribe of Indians whose certificate is revoked. This is the language used in section four:

"That all just indebtedness of such member existing at the time his certificate of competency is revoked shall be paid by the Secretary of the Interior, or his authorized representative, out of the income of such member, in addition to the quarterly income hereinbefore provided for; And provided further, That such revocation or cancellation of any certificate of competency shall not affect the legality of any transactions theretofore made by reason of the issuance of any certificate of competency."

[fol. 23] 9. That it was the plain and mandatory duty of the Secretary of the Interior to pay this indebtedness

owing to this defendant rather than to have fostered and assisted in long protracted litigation concerning the validity of said mortgage, and that it is now the plain and mandatory duty of the said Secretary of the Interior to pay said indebtedness rather than to instigate further and additional litigation over questions that have already been fully adjudicated.

Wherefore defendant prays that it be adjudged and decreed that the plaintiff be estopped from maintaining this action, and that the former action be held to be res adjudicata of all the questions herein involved and that the plaintiff be denied any relief whatsoever herein.

Chas. R. Gray, W. M. Palmer, Attorneys for Defendant,
Fred G. Drummond, Pawhuska, Oklahoma.

[Duly verified.]

[File endorsement omitted.]

EXHIBIT "A" TO ANSWER

13865

STATE OF OKLAHOMA,
County of Osage, ss:

This instrument was filed for record on the 25 day of July A. D. 1910, at 3.40 o'clock P. M., and duly recorded in Book 1 of Certificate of Competency at page 147.

T. M. Broadus, Register of Deeds. (Seal.)

Allotment No. 761

Whereas George Pitts a member of the Osage Tribe of Indians, has made application for the issuance of a certificate of competency under the provisions of paragraph 7 of section 2 of the Act of Congress approved June 28, 1906 (34 Stat. L. pp. 539-542); and

Whereas, upon investigation, consideration, and examination [fol. 24] tion of the request, George Pitts has been found to be fully competent and capable of transacting his own business and caring for his own individual affairs.

Now, therefore, the First Assistant Secretary of the Interior, by virtue of the power and authority vested in him

by paragraph 7 of Section 2 of said Act of Congress of June 28, 1906, does hereby issue to said George Pitts this certificate of competency and does hereby invest him with full power and authority to sell and convey any or all surplus lands deeded him under the provisions of said Act of Congress, except the minerals therein, which are reserved for the use of the Osage tribe for a period of twenty five years from April 8, 1906, and does hereby declare him to be fully competent and capable of managing and caring for his individual affairs.

Done at the City of Washington this — day of June 11, 1910.

This certificate of competency to become effective 30 days from date hereof and not before.

Frank Pierce, First Assistant Secretary of the Interior. C. F. H. W. C. P.

7-F. J.M.-2.

11223.

EXHIBIT "B" TO ANSWER

IN THE DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA

No. 17234

FRED G. DRUMMOND, Plaintiff,

vs.

GEORGE PITTS and VAN MORGAN, Defendants

ANSWER

Comes now George Pitts and for his separate answer to the petition of the plaintiff herein, alleges and states:

1. That he denies generally and specifically each of the allegations contained in the plaintiff's petition.
2. Further answering the petition of the plaintiff, this defendant alleges and shows to the court that he is a full (fol. 25] blood member of the Osage Tribe of Indians and that his name appears at page seventy (70) of the official roll of Osage Indians opposite allotment number 761, and that said roll shows and this defendant alleges the same to be a

fact, that he was born on November 1, 1880, and is a full blood Indian.

3. That by reason of the fact that he is an allotted full blood member of the Osage Tribe of Indians, his property and any property which he might acquire by descent, distribution of devise from another member of the Osage Tribe is subject to such laws as may be enacted by the Congress of the United States and such rules and regulations as may be prescribed by the Secretary of the Interior and the Commissioner of Indian Affairs pursuant to such acts of Congress.

4. This answering defendant further shows that the lands described in the petition of the plaintiff and on which the mortgage referred to in the petition of the plaintiff purports to be a lien, were inherited by this answering defendant from his wife, Mamie Fletcher Pitts.

5. This answering defendant further shows to the court that Mamie Fletcher Pitts was a duly enrolled and allotted member of the Osage Tribe of Indians, the said Mamie Fletcher Pitts being enrolled opposite number 156 and is shown by the official roll of the Osage Tribe to have been born on June 1, 1876, and to have been a full blood member of said tribe.

6. This answering defendant further alleges that all of the lands described in the petition of the plaintiff were lands owned by Mamie Fletcher Pitts at the time of her death and had been acquired by Mamie Fletcher Pitts either by reason of an allotment to her in her own name, or by inheritance from deceased relatives who were themselves members of the Osage Tribe, or by partition among members of the Osage Tribe and thereafter duly approved by the Secretary of the Interior, as required by law.

7. This answering defendant further shows to the court and alleges that at no time during her life did the Secretary of the Interior ever issue to the said Mamie Fletcher Pitts [fol. 26] a certain certificate of competency, authorizing her to sell or convey any of her lands, and this answering defendant alleges that the said Mamie Fletcher Pitts, during her lifetime, could not alienate or encumber any of the lands described in the petition of the plaintiff without the written consent of the Secretary of the Interior.

8. This answering defendant further shows to the court that on the 11th day of July, 1910, the Secretary of the Interior issued to him a certificate of competency and that said certificate of competency remained in full force and effect until the 24th day of June, 1938, when the same was, by order of the Secretary of the Interior, revoked, and the said George Pitts is now what is commonly known and referred to as a restricted Osage Indian.

9. This answering defendant further alleges that on April 18, 1912, the President of the United States approved an act of Congress which provides, in section 7 thereof, as follows, to-wit:

"Sec. 7. That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage Tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject or *or* be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs; Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage county, state of Oklahoma; provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes."

And thereafter, and on February 27, 1925, the President of the United States approved an Act of Congress, section 3 of which provides as follows:

[fol. 27] "Sec. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the

lien of any debt, claim or judgment except taxes, or subject to alienation without the approval of the Secretary of the Interior".

10. This answering defendant further shows to the court that Mamie Fletcher Pitts, Osage Allottee No. 156, died intestate on the 24th day of May, 1937, and that her estate was duly probated in the county court of Osage County, Oklahoma, in probate case Number 4347. That on the 9th day of September, 1938, the county court made and entered its order finding and determining the heirs of the said Mamie Fletcher Pitts, and did find and determine that the answering defendant was entitled to the various interests set forth in paragraph eleven (11) of the plaintiff's petition. This answering defendant further alleges that on the 16th day of February, 1939, the county court entered its order discharging the administrator theretofore appointed by said court.

11. This answering defendant says that by reason of the facts as herein set forth, and by reason of the acts of Congress above referred to, he was without power, right or authority to in any way alienate or encumber the land inherited by him from his deceased, full blood, restricted Osage Indian wife prior to the date of the decree of the county court determining heirs and distributing the estate and that said mortgage referred to and attached to the plaintiff's petition was and is invalid and did not convey, assign, or set over to the plaintiff any right, title, interest, estate or equity in any of the lands described in the petition of the plaintiff, and said mortgage is, as to said lands, null and void and without any legal force or effect.

12. Further answering, this defendant says that under the facts set forth herein and under the statutes above referred to [fol. 28] to, the lands inherited by him from his wife, Mamie Fletcher Pitts, were and are inalienable without the approval of the Secretary of the Interior, and this defendant alleges that said mortgage has never received the approval of the Secretary of the Interior, by reason of which said mortgage is null and void and did not convey to the plaintiff any right, title, interest, estate or equity in and to said lands and said mortgage is, as to said lands, null and void.

Wherefore, having fully answered the petition of the plaintiff, this answering defendant prays that the plaintiff

take nothing herein, and that this answering defendant be discharged herefrom with his costs.

Cross Petition

For his cross petition to the petition of the plaintiff, this answering defendant reiterates and repeats as though fully set out herein all of the allegations contained in the answer above, and further alleges that the instrument purporting to be a mortgage on the lands described in the petition of the plaintiff constitutes and is a cloud upon the title to said lands of this answering defendant and that the same is null and void, is without any legal force and effect, and should be removed.

And for his cross petition against the defendant, Van Morgan, this answering defendant reiterates all of the allegations contained in his answer, and further alleges that the judgment in favor of the said Van Morgan dated May 13, 1938, in the sum of \$435.00 with interest and costs, is not a lien on the lands described but constitutes a cloud upon the title to said lands and of this answering defendant and cross petitioner, and that the same should be removed.

Wherefore, this answering defendant and cross petitioner prays that the mortgage described in the petition of the plaintiff be, by this court, declared null and void, and prays that this court make and enter its judgment finding, determining and adjudging that said mortgage is null and void, and that same does not constitute a cloud upon the title of this defendant and *corss* petitioner.

[fol. 29] Your petitioner prays further for a judgment of the court that the judgment in favor of the defendant, Van Morgan, be found and determined not to be a lien upon the lands of this cross petitioner and that this court make and enter its order finding, determining and adjudging that the same is not and does not constitute a lien on the lands described herein.

Macdonald, Files & Barney, Attorneys for defendant,
George Pitts.

Endorsed: District Court, Osage County, Okla. Filed Jan. 8, 1940. Sam Gilmore, Court Clerk, by Gay Marple, Deputy.

Leave granted to file out of time, this 8th day of January, 1940. Hugh C. Jones, District Judge.

EXHIBIT "C" TO ANSWER

IN THE DISTRICT COURT, OSAGE COUNTY, OKLAHOMA

No. 17,234

FRED G. DRUMMOND, Plaintiff,

vs.

GEORGE PITTS, et al., Defendants

REPLY OF PLAINTIFF TO ANSWER OF DEFENDANT GEORGE PITTS
AND ANSWER OF PLAINTIFF TO CROSS PETITION OF DEFENDANT,
GEORGE PITTS.

Comes now the plaintiff, Fred G. Drummond and for
reply to the answer of the defendant, George Pitts, and for
answer to the Cross petition of the defendant, George Pitts
alleges and states:

1. That he denies each and every allegation in said answer
and cross petition contained except such as are consistent
with his petition and with this pleading.

2. Plaintiff admits the allegations of the answer of said
defendant contained in paragraphs Nos. 2, 4, 5, 6, 7, 8, 9
and 10.

3. Plaintiff denies all of the statements contained in paragraphs
Nos. 11 and 12 whether they be intended for statements
of fact or conclusions of law, and alleges that the note
and mortgage described in plaintiff's petition are good
and valid and did not require the approval of the Secretary
[fol. 30] of the Interior, and that by reason thereof the
plaintiff acquired a lien on the lands described in his petition,
and a right to foreclose the same.

Wherefore, plaintiff prays that the prayer of his petition
be granted.

Answer to Cross Petition

For answer to the defendant's cross petition the plaintiff
repeats as though fully set out herein all of the allegations
contained in the above and foregoing reply.

Wherefore, plaintiff prays that the defendant take nothing
and that he have the relief prayed for in his petition.

Gray & Palmer, Attorneys for plaintiff.

Endorsed: District Court, Osage County, Okla. Filed
Jan. 18, 1940. Sam Gilmore, Court Clerk, by Guy Marple,
Deputy.

EXHIBIT "D" TO ANSWER

No. 17,234

IN THE DISTRICT COURT, OSAGE COUNTY, OKLAHOMA

FRED G. DRUMMOND, Plaintiff,

vs.

GEORGE PITTS, Defendant

AMENDMENT TO REPLY

Comes now the plaintiff and for amendment to his reply states:

1. That section 6 of the Act of Congress of April 18, 1912, relative to the Osages provides that when heirs of deceased Osage allottees have certificates of competency or are not members of the tribe the restrictions against alienations of their lands "are hereby removed".

Wherefore, plaintiff prays that the prayer of his petition be granted.

Gray & Palmer, Attorneys for Plaintiff

Endorsed: District Court, Osage County, Okla. Filed Feb. 9, 1940. Sam Gilmore, Court Clerk, by Guy Marple, Deputy.

[fol. 31]

EXHIBIT "E" TO ANSWER

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. —

GEORGE PITTS, Plaintiff in Error,

vs.

FRED G. DRUMMOND, Defendant in Error

PETITION IN ERROR

George Pitts, plaintiff in error, complains of the said defendant in error, Fred G. Drummond, for that the said Fred G. Drummond, at the January, 1940, term of the

District Court of Osage County, state of Oklahoma, recovered a judgment by the consideration of said court against the said George Pitts in a certain action then pending in the said court, wherein the said Fred G. Drummond was plaintiff and the said George Pitts was defendant. The original case made, duly signed, attested and filed, is hereto attached, marked exhibit "A", and made a part of this petition in error; and the said George Pitts avers that there is error in the said record and proceedings in this, to-wit:

1. That the court erred in overruling the motion of the plaintiff in error for a new trial.
2. That the court erred in admitting in evidence the note and mortgage offered by the plaintiff, the defendant in error herein.
3. That the court erred in rendering a judgment in favor of the plaintiff, the defendant in error herein, and against the defendant, the plaintiff in error herein.
4. That the court erred in foreclosing the mortgage involved herein.
5. That the court erred in refusing and declining to sustain the cross petition of the defendant in refusing to quiet the title of this plaintiff in error in and to the lands described in the petition of the plaintiff, and to adjudge and decree that the mortgage described in the petition of the plaintiff was null and void.

Wherefore, plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that judgment may be rendered in favor of the plaintiff [fol. 32] in error and against the defendant in error, and that the plaintiff in error be restored to all rights which he has lost by the rendition of such judgment, and for such other and further relief as to the court may seem just.

George Pitts, Plaintiff in Error, by R. A. Barney, His Attorney.

EXHIBIT "F" TO ANSWER

STATE OF OKLAHOMA,
County of Osage, ss:

IN DISTRICT COURT

No. 17,234

FRED G. DRUMMOND, Plaintiff,

vs.

GEORGE PITTS and VAN MORG, Defendants

SUPERSEDEAS BOND

Know All Men by These Presents, That we, George Pitts as Principal, and National Surety Corporation of N. Y. as sureties are held and firmly bound unto Fred G. Drummond, Plaintiff, in the penal sum of Three thousand and no/100 (\$3000.00) dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of *su*, our heirs, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is such that whereas, in the district court of Osage county, in the above entitled cause, on the 9th day of February, 1940, it was ordered, adjudged and decreed by the court that the plaintiff have and recover judgment against the defendant, George Pitts in the sum of \$2500.00, with interest, costs and attorney fee, and for foreclosure of a mortgage; and whereas, the above named principal has appealed from said judgment to the Supreme Court of said state, and gives this undertaking in order that execution of said judgment shall be stayed pending the determination of said cause on appeal. Now, therefore, if said above named Principal shall not, during his possession of said property pending a determination of said cause on appeal, commit or suffer to be committed, any waste thereon, and if the judgment be affirmed, shall pay the value of the use and occupation of said property from the date of this undertaking until delivery of possession thereof *prusuant* to such judgment, and shall pay [fol. 33] all costs, and shall pay any deficiency of such judgment remaining after the sale of said property, then this

obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, we have hereunto subscribed our names this 25th day of March, 1940.

George Pitts, Principal, National Surety Corporation
of N. Y. By George P. Wingo, Atty. in Fact
Surety. (Seal.)

Approved 3-26-40 Sam Gilmore, Court Clerk by Guy Marple, Deputy.

Approved this 9th day of March, 1940.

Wm. Ash Waid, Osage Indian Agency Oil & Gas Inspector
in charge.

• • • • •

Endorsed: District Court, Osage county, Okla. Filed March 26, 1940.

Sam Gilmore, Court Clerk, by Guy Marple, Deputy
Recorded in Bond Record No. 10, page No. 570.

EXHIBIT "G" TO ANSWER

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 29,859

GEORGE PITTS, Plaintiff in Error,

vs.

FRED G. DRUMMOND, Defendant in Error

SYLLABUS

1. All restrictions on the alienation of lands inherited by Osage Indians who hold certificates of competency were removed by the provisions of section 6 of the Act of Congress approved April 18, 1912 (37 Stat. 86).

2. That portion of section 7 of the Act of Congress approved April 18, 1912, which provides that no lands or moneys inherited from Osage allottees shall be subject to be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands are

[fol. 34] moneys are turned over to such heirs does not apply to the restricted lands of such deceased allottee and which are not assets in the hands of his administrator for the payment of debts.

3. Section 3 of the Act of Congress approved February 27, 1925, (43 Stat. 1008), imposing restrictions on inherited lands of certain Osage Indians does not purport to restrict the alienation of such lands belonging to Osages who hold certificates of competency.

Appeal From District Court of Osage County.

Hon. Hugh C. Jones, Judge.

Action by Fred G. Drummond against George Pitts. Judgment for plaintiff, and defendant appeals.

Affirmed

R. A. Barney, Pawhuska, for Plaintiff in Error. Charles R. Gray and W. N. Palmer, Pawhuska, for Defendant in Error.

* * * * *

GIBSON, J.:

This is an action on note and to foreclose mortgage executed by a full blood Osage Indian on his inherited tribal lands. Judgment was for Plaintiff and the defendant mortgagor appeals.

Defendant takes no exception to the judgment so far as the indebtedness is concerned, but alleges that by reason of certain Acts of Congress relating to the property and affairs of the Osages the mortgaged premises were restricted lands and not subject to alienation without the approval of the Secretary of the Interior. Sec. 7, Act of April 18, 1912 (37 Stat. 86); Sec. 3, Act of February 27, 1925, (43 Stat. 1008). The cross petition seeks cancellation of the mortgage.

The lands in question were inherited by defendant from his wife, who was a full blood Osage. They consisted of the wife's individual allotment and allotments of relatives inherited by her.

Plaintiff says there were no restrictions of any kind, or prohibition against the sale or encumbrance of the mort-[fol. 35] gaged premises at the time the mortgage was exe-

cut. It is asserted that section 6 of the Act of 1906 above, removed all restrictions on the alienation of inherited lands of Osages holding certificates of competency; that the defendant held such a certificate and was therefore capable of executing the mortgage without authorization or approval by the Secretary of the Interior.

Said section 6, so far as material herein, provides in substance that thereafter the lands of deceased Osage allottees might be partitioned by agreement of the heirs or by order of the proper Oklahoma court, except that the partition of the restricted lands of such deceased allottees should be approved by the Secretary of the Interior; and there was the further provision, "When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed."

The defendant held a certificate of competency. He apparently came within the latter provision removing restrictions on alienation.

But defendant says that since the estate of his wife was in process of administration in county court, and his interest therein had not been delivered or turned over to him when he executed the mortgage, the lands were restricted within the meaning of section 7 of the Act of 1912, and that the mortgage was therefore void.

Said section 7 provides that the lands allotted to members of the Osage Tribe shall not in any manner whatever be encumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, nor shall the lands or funds of such members be subject to any claim against the same arising prior to grant of certificate of competency. And it is further provided therein as follows: "That no lands or moneys inherited from Osage allottees shall be subject to or taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs".

Defendant contends that notwithstanding his certificate of competency the provision quoted above would prohibit [fol. 36] encumbrance of his inherited land prior to determination of heirship and decree of distribution in county court.

In *United States v. Mullendore*, 30 Fed. Supp. (N. D. Okla.) 13, the court had under consideration the above

quoted provision of section 7 so far as it pertained to the inherited tribal lands of an heir who was not a member of the tribe. The court held that in the interest of harmonious interpretation of the act it was necessary to hold that said provision applied only to those heirs not designated as unrestricted in section 6. According to that decision the lands descended to heirs holding certificates of competency and to heirs who were not members of the tribe free from all restrictions or further prohibition against alienation.

On further consideration of the provision in section 7 the court said, in substance, that even if such provision did apply to an heir who was not a member of the tribe, and notwithstanding the estate of the deceased was pending administration in county court, the requirements of said provision had been satisfied because in that case the heir was in physical possession of the land when the mortgage was executed.

And in this connection the court further said: "Technical consideration of whether or not DeRoin acquired his title upon the death of the ancestor or upon the date of the decree of distribution or at some intermediate time seems to be beside the point here, although it may be noted that the statutes of Oklahoma provide the administrator of an estate takes possession only for the purpose of administration and as soon as it appears that the lands are not necessary for the payment of debts, the lands shall be delivered to the heirs. Sec. 1193, 1218, Okla. Stat. 1931, 58 Okl. St. Ann. secs. 251, 291." It is clear from the language of the opinion that the control of the lands by the administrator and his formal release thereof or delivery to the heirs was not essential to unrestricted alienation by heirs who were classed as unrestricted by section 6.

Assuming, however, that the provision in section 7 was a restriction or limitation of the right to encumber or alienate, the lands in the instant case were not subject to control of the administrator. They were not assets in his [fol. 37] hands for the payment of the debts of the deceased. The deceased was a full blood Osage Indian who had not received a certificate of competency. Therefore her lands were restricted and free from any of her obligations. Under the various Acts of Congress these lands could not be taken to satisfy the debts of the deceased owner. Act of June 28, 1906, sec. 4, 7 (34 Stat. 539); Act of April 18,

1912, sec. 7 (37 Stat. 86); Act of March 3, 1921 sec. 3 (41 Stat. 1249); Act of February 27, 1925, sec. 3 (43 Stat. 1008); Act of March 2, 1939 (45 Stat. 1480). We have so held with reference to the headright of deceased Osages. *Tucker v. Brown*, 185 Okla. 234, 90 Pac. (2d) 1071; *Brunt v. Labadie*, 186 Okla. 700, 100 Pac. (2d) 267. The jurisdiction of the county court extended to the determination of heirship (in *re Thompson's Estate*, 179 Okla. 240, 65 Pac. (2d) 442), but not beyond that.

It follows that there was no court or officer with power or authority to "turn over" the lands or to deliver them to the heirs. Immediately on the death of the owner they descended to their heirs free from all restrictions *together* with the absolute right of immediate possession.

Defendant next contends that the lands in question were restricted or restrictions reimposed thereon, by section 3 of the Act of 1925, *supra*, and in support cites *United States v. Johnson*, 29 Fed. Supp. (N. D. Okla.) 300.

Section 3 provides in part as follows:

"Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior."

This section, says defendant, according to the decision in the *Johnson* case, above, placed restrictions on inherited lands of two classes of heirs,—first, lands inherited by members of the Osage Tribe of one-half or more Indian blood, and, second, lands inherited by members of the Osage Tribe who do not have certificates of competency. Defendant says he belongs to the first named [fol. 38] class notwithstanding his certificate of competency. In that case we find the following language concerning section 3: "The Act plainly states that it applies to two classes: first, to lands derived to members of the Osage Tribe of one-half ($\frac{1}{2}$) or more Indian blood; and, second, to lands devised to members of the Osage Tribe who do not have certificates of competency".

In any event, it is clear that all Indians holding certificates of competency were excluded from the restrictions in section 3. Plaintiff belonged to that class, and his inherited lands were left free of restrictions.

In the Johnson case the court was considering the question of restrictions on the inherited tribal lands of an unenrolled member of the tribe of less than half Indian blood. The court held that the Act of 1929, *supra*, reimposed restrictions on such Indians, and since the heir in that case had no certificate of competency his inherited lands was restricted by section 3 of the Act of 1925. The case is hardly in point, but it serves as some authority that Osages who have certificates of competency are not affected by section 3, *supra*.

The judgment is affirmed.

Corn, V. C. J., and Riley, Osborn, Bayless, Hurst and Davison, JJ., concur; Welch, C. J., and Arnold, J., absent.

EXHIBIT "H" TO ANSWER

In the Supreme Court of the State of Oklahoma. George Pitts, Plaintiff in Error, v. Fred G. Drummond, Defendant in Error.

Petition for Rehearing

Comes now George Pitts, plaintiff in error herein, and respectively represents to the court that on the 6th day of May, 1941, a decree and judgment was rendered by this court and in this cause affirming a decree of foreclosure of certain lands involved herein and adjudging that under the applicable acts of Congress relating to Osage Indians there were no restrictions upon the land mortgaged by the plaintiff in error.

[fol. 39] 1. Your petitioner respectfully represents that said decision is in conflict with the statutes of the United States relating to Osage Indians and is in direct contravention thereof.

2. That said decision is in direct conflict with the decisions of the United States courts on the same or similar subjects and unless changed will result in a hopeless conflict of decisions between the two courts on identical or similar questions.

Wherefore, plaintiff in error prays that a rehearing of said cause may be granted by your honorable court and that upon a reconsideration thereof the decision of the District court of Osage County be reversed.

R. A. Barney, Attorney for Plaintiff in error.

EXHIBIT "I" TO ANSWER

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. —

GEORGE PITTS, Petitioner,

v.

FRED G. DRUMMOND, Respondent

Petition for Writ of Certiorari to the Supreme Court of
OklahomaTo the Honorable, Harlan F. Stone, Chief Justice, and the
Associate Justices of the Supreme Court of the United
States:Your Petitioner, George Pitts, most respectfully represents
and shows to you as follows:

History of the Case

The respondent, Fred G. Drummond instituted this action in the District Court of Osage County, Oklahoma, on October 24, 1939, for a money judgment on a note and to foreclose a mortgage executed by the petitioner on July 12, 1937. (R. 3-12).

[fol. 40] To this your petitioner answered, alleging that he was a full-blood member of the Osage Tribe of Indians and that he was subject to the laws of the United States of America relating to Osage Indians, and that he and his property were under the control and supervision of the Secretary of the Interior of the United States. He further alleged that he was granted a certificate of competency by the Secretary of the Interior on July 11, 1910, and that his certificate of competency was revoked by the Secretary on June 24, 1938.

As to the lands sought to be foreclosed, your petitioner alleged that he had inherited all of the lands from his wife, who was at all times a full-blood, restricted member of the Osage Tribe of Indians; that she died intestate on the 24th day of May, 1937; that on the 9th day of September, 1938, the County Court of Osage County made and entered its order finding and determining the heirs of Mamie

Fletcher Pitts and setting over to your petitioner his interest in the mortgaged lands.

Your petitioner further alleged that on April 18, 1912, the President of the United States approved an act of Congress relating to the Osage Indians, section 7 of which provides as follows, to-wit (37 Stat. L. 86, 88):

“That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or money inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs; Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage county, state of Oklahoma; Provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes”.

[fol. 41] and thereafter, and on February 27, 1925, the President of the United States approved an act of Congress, Section 3 of which provides as follows, to-wit (43 Stat. L. 1008, 1010):

“Land devised to members of the Osage Tribe of one-half or more Indian blood who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior”.

Your petitioner further alleged that by reason of the fact that the mortgage executed by him had never re-

ceived the approval of the Secretary of the Interior by reason of the acts of Congress above referred to. He was without power, right or authority to in any way create or encumber the lands mortgaged, prior to the date of the decree of the county court determining the heirs and distributing the estate, and further alleged that the mortgage was invalid and did not convey, assign or set off to the plaintiff any right, title, interest, estate or equity in any of the lands described in the petition.

Your petitioner therefore prayed that the respondent take nothing, and, as his cross petition prayed that the court find and determine that the mortgage was null and void, and that it did not constitute a cloud upon the title of your petitioner. (R. 15).

To this answer the respondent herein filed a reply admitting all of the facts but denying all of the conclusions of law. (R. 20)

The case was tried upon the admission of the note and mortgage, over the objections of the respondent and the admissions contained in the plaintiff's reply. The court found in favor of the respondent and against the petitioner, and rendered judgment against your petitioner for the sum of \$2500.00 with interest at ten percent from July 12, 1938; \$275.00 attorney fees and for foreclosure of mortgage. (R. 23).

[fol. 42] From this adverse judgment an appeal was taken to the Supreme Court of the State of Oklahoma, which court, on the 6th day of May, 1941, handed down its decision affirming the judgment of the trial court and holding that the mortgage was valid. (R. 39). On the 6th day of June, 1941, and within the time allowed by law and order of said Supreme Court, your petitioner filed his petition for a rehearing of said cause (R. 43) which was, by the court, on the 28th day of October, 1941, overruled and denied. (R. 44). The mandate was issued by the Supreme Court to the District Court of Osage County, (R. 46).

Reasons for Granting Petition for Writ of Certiorari

A

This case involves the construction of acts of Congress of the United States relating to Osage Indians. It presents the broad question of whether lands inherited from

a restricted member of the Osage Tribe by a member holding a certificate of competency are subject to alienation by the heir, without the approval of the Secretary of the Interior of the United States, and prior to the time such lands have been "turned over to him" by the state court. The opinion of the Supreme Court of the State has not been published, but it appears on pages 39-43 of the transcript.

B

The decision of the Supreme Court of Oklahoma is directly contrary to and in conflict with a reported decision of the United States District Court for the Northern District of Oklahoma in the case of *United States v. Johnson*, 29 Fed. Supp. 300, and it therefore presents a conflict of decisions interpreting a federal statute involving Osage Indians.

C

Because of the conflict in the decisions of the United States District Court for the Northern District of Oklahoma and the Supreme Court of the State of Oklahoma, and because of the fact that title to the land is involved, and because the construction of federal statutes is involved, your petitioner respectfully states that this court should accept jurisdiction to review this case in order that a correct and proper decision of the federal statutes involved [fol. 43] may be arrived at, and in order that the confusion concerning the title to lands owned and inherited by members of the Osage Tribe may be avoided and the statutes of such lands finally and authoritatively determined.

D

A certified transcript of the record, certified by the Clerk of the Supreme Court of Oklahoma on the 13 day of December, 1941, (R. 46), is transmitted, and your petitioner, George Pitts, respectfully requests that same be filed as an exhibit to this petition for certiorari.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court to the Supreme Court of Oklahoma, commanding said court to certify to this court a full and complete transcript of the record and of the proceedings in said Supreme Court of Oklahoma

had in the case numbered and entitled on its docket, 29,859, George Pitts, Plaintiff in Error, vs. Fred G. Drummond, Defendant in Error, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States, and that the judgment herein of said Supreme Court of the State of Oklahoma be reversed by this court and for such further relief as this court may deem proper.

Dated at Pawhuska, Osage county, Oklahoma, this day of January, 1942.

Ralph A. Barney, Counsel for Petitioner, Pawhuska, Oklahoma.

EXHIBIT "J" TO ANSWER

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 901

GEORGE PITTS, Petitioner,

vs.

FRED G. DRUMMOND

No. 29859

On petition for writ of certiorari to the Supreme Court of the State of Oklahoma.

[fol. 44] On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Oklahoma and of the argument of counsel thereupon had,

It is ordered by this court that the said petition be, and the same is hereby, Denied.

March 2, 1942.

A true copy Charles Elmore Cropley,

Test: Clerk of the Supreme Court of the United States by Hugh W. Barr, Deputy.

Filed in Supreme Court of Oklahoma. Mar. 6, 1942.

Andy Payne, Clerk

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed March 13, 1943

It Is Agreed and Stipulated by and between the plaintiff, United States of America, by its undersigned counsel

Whit Y. Mauzy, the duly appointed, qualified and acting United States Attorney for the Northern District of Oklahoma, and the defendant, Fred G. Drummond, by his undersigned attorneys, Chas. R. Gray and W. N. Palmer, as follows, to-wit:

I

That the allegations contained in the following numbered paragraphs of plaintiff's complaint are true and correct, to-wit: Paragraphs number I, IV, V, VI, VII, VIII, XI, XII and XIV.

II

That on or about the 11th day of July, 1910, the Secretary of the Interior of the United States issued to George Pitts a certificate of competency authorizing the said George Pitts to sell and convey any lands allotted to him as surplus land. That said certificate of competency remained in full force and effect until the 24th day of June, 1938, when the same was by order of the Secretary of the Interior of the United States revoked.

III

That the allegations contained in the following numbered [fol. 45] paragraphs of the first portion of the answer of the defendant, Fred G. Drummond, are true and correct, to-wit: Paragraphs number II, III, IV, V, VI, VII, VIII, IX, X, XI, XIII, XVI, XVIII, XIX and XXII.

IV

That George Pitts entered into a contract with Ralph A. Barney, an attorney engaged in the practice of law at Pawhuska, Osage County, Oklahoma, to represent him in litigation in the State Courts and before the Supreme Court of the United States, which contract of employment was approved by C. L. Ellis, Superintendent of the Osage Indian Agency by virtue of a letter dated December 21, 1938, a copy of which letter is attached hereto and made a part hereof, marked Exhibit "A". That the said Ralph A. Barney, as attorney for George Pitts, did represent said George Pitts in the District Court of Osage County, Oklahoma and, thereafter, in the Supreme Court of the State of Oklahoma and before the Supreme Court of the United States in an attempt to obtain the allowance of a writ of certiorari.

V

George Pitts had a certificate of competency at the time of the death of his wife, Mamie Pitts.

VI

That either party hereto may offer any such evidence in addition to this stipulation as said party may deem competent or material.

Witness our hands this 12th day of March, 1943.

Whit Y. Mauzy, United States Attorney, Attorney for Plaintiff. Chas. R. Gray, W. N. Palmer, Attorneys for Defendant, Pawhuska, Oklahoma.

[File endorsement omitted.]

[fol. 46] EXHIBIT "A" TO STIPULATION OF FACTS

41990-38

42855-38

GEN

Osage Indian Agency
Pawhuska, Oklahoma
December 21, 1938.

Messrs. Macdonald, Files and Barney,
Attorneys at Law,
Pawhuska, Oklahoma.

Gentlemen: This will refer to your letter dated December 3, 1938, enclosing the request of George Pitts, restricted Osage allottee No. 761, for the approval of your employment to represent him in the matter of certain disputed claims filed against him for payment as a result of the revocation of his certificate of competency, and to your letter dated December 15, 1938, stating that your fee will not exceed \$500.00.

In compliance with the allottee's request, your employment in the above matter is hereby authorized with fee to be determined by the Secretary of the Interior on a quantum meruit basis at the conclusion of the services, payment to be made from such funds as are available at the termination thereof.

Very truly yours, C. L. Ellis, Superintendent

cc—Commissioner of Indian Affairs,
Washington, D. C.
Mr. George Pitts,
Pawhuska, Oklahoma.

In United States District Court

REQUEST FOR ADMISSIONS UNDER RULE 36 OF FEDERAL RULES
OF CIVIL PROCEDURE—Filed April 2, 1943

That the defendant, Fred G. Drummond, requests the plaintiff, The United States of America, to make the following admissions for the purpose of this action only, subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the allegations contained in the following numbered paragraphs of the first portion of the answer of the defendant Fred G. Drummond, are true and correct, to-wit: Paragraphs number XII, XIV, XV, XVII, XX and XXI.

2. That the letters of December 21, 1938, from C. L. Ellis, Superintendent, to Messrs. Macdonald, Files & Barney was written by said Superintendent in pursuance of special or general authority from the Secretary of the Interior of the United States of America.

3. That on or about the 2nd day of November, 1939, and after the foreclosure suit had been filed in the district court of Osage County, Oklahoma, by Fred G. Drummond against George Pitts, George Pitts wrote a letter to the Superintendent of the Osage Agency stating in substance that he had employed Ralph A. Barney to represent him in the Drummond v. Pitts litigation and asked for approval of his employment, and that upon receipt of this letter Mr. Ellis, the Superintendent, wrote a letter to the Commissioner of Indian Affairs, concerning it, and that Ralph A. Barney received another letter from the Superintendent of Osage Agency dated on or about November 18, 1939, in which reference is made to the former letter of December 21, 1938, to Messrs. Macdonald, Files & Barney, approving of the employment of Mr. Barney to represent Mr. Pitts generally concerning claims against him, and that it was further stated in substance in said letter of November 18, 1939, that the Commissioner of Indian Affairs considered his previous letter of December 21, 1938, sufficient authority for Mr. Barney to represent Mr. Pitts in the Drummond litigation in the State Court.

4. That in pursuance of a Request from Mr. Ralph A. Barney, attorney for George Pitts, made on or about Feb-

ruary 9, 1940, the Secretary of the Interior authorized said Ralph A. Barney to appeal from the decision of the district court to the Supreme Court of the state of Oklahoma.

5. That in pursuance of request from Mr. Ralph A. Barney, made on November 7, 1941, the Secretary of the Interior, on December 9, 1941, authorized the said Ralph A. Barney to make application to the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of the State of Oklahoma for the purpose of the undertaking to secure a review of the decision rendered by the Supreme Court of the State of Oklahoma affirming the judgment of the district court of Osage county, Oklahoma.

6. That the Secretary of the Interior of the United States of America had knowledge through the officials of his department of the pendency of said action which was begun in the district court of Osage county, Oklahoma, by Fred G. Drummond against George Pitts, and of the steps taken throughout said litigation, and that the Secretary of the Interior authorized and approved the employment of Ralph A. Barney to represent the said George Pitts throughout said litigation, and that the said Ralph A. Barney, in pursuance of said employment, represented the said George Pitts throughout said litigation, and that the Secretary of the Interior, the Commissioner of Indian Affairs, and the Superintendent of the Osage Agency, and the Tribal Council of the Osage Tribe of Indians, assisted and cooperated with said George Pitts and his attorney, Ralph A. Barney, in conducting the defense to said cause of action of this defendant Fred G. Drummond, and arranged for the payment of said counsel, Ralph A. Barney, for the representation of the said George Pitts, from the funds of the said George Pitts which are under the control and supervision of the Secretary of the Interior, and advanced from the funds the necessary costs and expenses of carrying on said litigation.

7. That it has long been the practice of the Secretary of the Interior of the United States of America to approve the employment of attorneys to represent individual Indians in their litigation, and by Section 6 of the Act of February 27, 1925, and by other acts and by general laws such employment is authorized.

8. That the Secretary of the Interior did in writing authorize and approve of the employment of Ralph A. Barney to represent the said George Pitts throughout the litigation between Fred G. Drummond and George Pitts conducted in the State Courts and before the Supreme Court of the United States, and that the said Ralph A. Barney, in pursuance of said employment, and as the attorney approved by the Department of the Interior, did efficiently, [fol. 49] diligently and ably represent the said George Pitts throughout said litigation.

Chas. A. Gray, W. N. Palmer, Attorneys for the Defendant, Pawhuska, Oklahoma.

Service and receipt of copy of the above and foregoing Request for Admissions is hereby acknowledged this 2nd day of April, 1943.

Whit Y. Mauzy, United States District Attorney,
Northern District of Oklahoma, Attorney for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER TO DEFENDANT'S REQUEST FOR ADMISSIONS—Filed
May 10, 1943

The United States of America makes the following statement in response to the defendant's request for admissions served upon the United States on the 2nd day of April, 1943.

I

A. We have been unable to obtain a copy of the record, therefore, are unable to determine whether the quotation contained in Paragraph XII of the Answer is true or correct and no one authorized to appear for the United States was present at the trial of said cause and the United States Attorney has been unable to determine whether said quotation is correct. Even if it is correct, it is immaterial and *irrelevant* to the issues in the case at bar.

b. The supersedeas bond mentioned in Paragraph XIV of defendant's answer was approved by Wm. Ash Wade,

Osage Indian Agency, Oil and Gas Inspector in Charge, who was at said time acting as Acting Superintendent of the Osage Indian Agency. Mr. Wade's approval of the appeal and supersedeas bond was authorized by Honorable W. C. Mendenhall, Acting Assistant Secretary of the Interior.

b. c. As to Paragraph XV of the defendant's answer, the facts stated in said paragraph are true, but the facts contained therein are immaterial and irrelevant to the issues presented in the case at bar.

d. As to Paragraph XVII of the defendant's answer, the facts stated in said paragraph are true, but the facts contained therein are immaterial and irrelevant to the issues presented in the case at bar.

e. As to Paragraph XX of the defendant's answer, the facts stated in said paragraph are true, but the facts contained therein are immaterial and irrelevant to the issues presented in the case at bar.

f. As to Paragraph XXI of the defendant's answer, the facts stated in said paragraph are true, but the facts contained therein are immaterial and irrelevant to the issues presented in the case at bar.

II

The United States is unable to admit Paragraph II of defendant's request because the same is not one of fact, but a conclusion of law. The letter of December 21, 1938 from C. L. Ellis, Superintendent, to Messrs. Macdonald, Files and Barney may have been written by the Superintendent in pursuance to a letter dated March 2, 1928 from the Commissioner of Indian Affairs to J. Geo. Wright, Superintendent of the Osage Indian Agency, which is as follows, to-wit:

"United States Department of the Interior, Office of Indian Affairs, Washington

March 2, 1928
D-929-28.

Mr. J. George Wright, Superintendent,
Osage Indian Agency.

DEAR MR. WRIGHT:

Receipt is acknowledged of your letter of February 18, regarding the payment of attorneys' fees in cases involving restricted Indians.

In the future in cases where the employment of an attorney is considered proper and necessary and the fees requested will not be in excess of \$500, you are authorized to inform such attorney that their employment will be approved with the understanding that the fee will be determined [fol. 51] by the Department on a quantum meruit basis after the services have been performed. In other cases where a larger fee may be anticipated it is believed advisable to have the contract submitted to the Department for consideration.

Sincerely yours, Chas. H. Burke, Commissioner.

Approved: March 5, 1928.

John H. Edwards, Assistant Secretary."

III

We are unable to admit or deny that on or about the 2nd day of November, 1939 George Pitts wrote a letter to the Superintendent of the Osage Indian Agency relating to the fact that he had employed R. A. Barney to represent him in the Drummond vs. Pitts litigation. It appears that Messrs. Macdonald, Files and Barney wrote a letter to C. L. Ellis, Superintendent of the Osage Indian Agency, dated November 2, 1939 and enclosed therewith was a request of George Pitts for the approval of the employment of Messrs. Macdonald, Files and Barney as his attorneys to appear for him in connection with a suit filed by Fred G. Drummond. On the 18th day of November, 1939, C. L. Ellis, Superintendent of the Osage Indian Agency, answered said letter of November 2, 1939 and a copy of said Superintendent's letter is attached hereto and marked Exhibit "A".

IV

That on or about the 2nd day of March, 1940, W. C. Mendenhall, Acting Assistant Secretary of the Interior, upon the recommendation of C. L. Ellis, Superintendent of the Osage Indian Agency, approved appeal and supersedeas bond and granted authority for expenses not to exceed five

hundred dollars (\$500.00) and, thereafter, on the 16th day of March, 1940, Wm. Ash Wade, Oil and Gas Inspector in Charge, Osage Indian Agency, advised R. A. Barney by letter that, "An appeal to the Supreme Court of the State of Oklahoma in the above mentioned case," (Fred G. Drum- [fol. 52] mond v. George Pitts, No. 17234 in the District Court of Osage County) "was approved by the Department on March 2, 1940. Authority was also granted under said date for the approval of the supersedeas bond in this case."

V

That on the 6th day of December, 1941, W. C. Mendenhall, Acting Assistant Secretary of the Interior, sent a telegram to T. B. Hall, Superintendent of the Osage Indian Agency, which read as follows: "Relet George Pitts appeal and expenses approved as recommended." On the 9th day of December, 1941, T. B. Hall, Superintendent of the Osage Indian Agency, wrote a letter to Mr. R. A. Barney, concerning the writ of certiorari from the Supreme Court of the United States. A copy of said letter is attached hereto and marked Exhibit "B".

VI

The United States states that it cannot truthfully either admit or deny the matters set forth in Paragraph VI of defendant's request for the reason that this is a catch-all statement in which statements of fact and conclusions of law are inextricably mixed.

VII

The United States neither admits nor denies the facts contained in Paragraph VII of defendant's request for admissions for the reason that said request does not pertain to a relevant and material fact and the latter part of said request is obviously a request for a conclusion of law rather than an admission of fact.

VIII

The United States denies the statements contained in Paragraph VIII of defendant's request for admissions, except as to the employment of Ralph A. Barney as may be stated in other parts of this instrument and the United States declines an answer to the latter part of Paragraph

[fol. 53] VIII of said defendant's request for the reason that said request is a request for an opinion and not of material fact.

United States of America, by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma.

[Duly verified.]

[File endorsement omitted.]

EXHIBIT "A" TO ANSWER

41990-38

42855-38

38598-39

GEN:pl

Osage Indian Agency,
Pawhuska, Oklahoma,
November 18, 1939.

Messrs. Macdonald, Files and Barney, Attorneys at Law,
Pawhuska, Oklahoma.

GENTLEMEN:

This will acknowledge receipt of your letter dated November 2, 1939, enclosing the request of George Pitts, restricted Osage allottee No. 761, for the approval of your employment to represent him in connection with the suit filed by Fred G. Drummond, against him to foreclose a mortgage and for personal judgment in the sum of \$2500.00.

The records of this office show that under date of December 31, 1938, you were authorized to represent George Pitts in the matter of certain disputed claims filed against him for payment as a result of the revocation of his certificate of competency, and it is believed that said authorization is sufficient to cover the suit referred to above.

Very truly yours, C. L. Ellis, Superintendent.

cc: Commissioner of Indian Affairs, Washington, D. C.
Mr. George Pitts, Pawhuska, Oklahoma.

[fol. 54]

EXHIBIT "B" TO ANSWER

60642

Osage, Indian Agency,
Pawhuska, Oklahoma,
December 9, 1941.

Mr. R. A. Barney, Attorney at Law, Pawhuska, Oklahoma.

DEAR MR. BARNEY:

Reference is made to your letter of November 7, 1941 regarding the case of Drummond vs. Pitts, No. 17234, District Court of Osage County, Oklahoma, advising that you believe the case should be appealed to the Supreme Court of the United States and asking that \$400 of the funds of George Pitts, restricted Osage allottee No. 761, be made available for the expense.

The matter has been submitted to the Department and I am now in receipt of a telegram from the Acting Assistant Secretary of the Interior advising that the appeal and expenses in the above case are approved.

Sincerely yours, T. B. Hall, Superintendent.

Copy: Mr. George Pitts, Pawhuska, Oklahoma.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed September 4, 1943

FINDINGS OF FACT

The court finds:

I

That Mamie Fletcher Pitts was a full blood member of the Osage Tribe of Indians, enrolled opposite No. 156; that she was never issued a certificate of competency; that she died intestate on May 24, 1937, seized and possessed of the real estate involved in this action, which had been allotted to her as a member of the Osage Tribe.

II

That the United States maintains this action in its own behalf and on behalf of George Pitts, a full blood member

of the Osage Tribe of Indians, enrolled opposite No. 761. [fol. 55] That the defendant, Fred G. Drummond, is a resident of Osage County, Oklahoma.

III

That George Pitts was the surviving husband of Mamie Fletcher Pitts; that proceedings were duly instituted in the County Court of Osage County to administer the estate of Mamie Fletcher Pitts, deceased, and George Pitts was appointed, qualified and acted as administrator of such estate; that on September 9, 1938, the County Court entered an order adjudging George Pitts to be the sole heir of Mamie Fletcher Pitts and entered an order directing the distribution of the estate to him as such heir; that on February 16, 1939, the administrator was discharged by order of the County Court.

IV

That on July 11, 1910, the Secretary of the Interior issued to George Pitts a certificate of competency which remained in full force and effect until June 24, 1938, when such certificate was revoked by the Secretary of the Interior.

V

That George Pitts, as administrator of the estate of Mamie Fletcher Pitts, deceased, executed agricultural leases on land involved in this action, which were approved by the County Court of Osage County; that such leases were prepared on departmental forms and submitted to the Administrator by the Osage Indian Agency, and during the course of the administration of the estate the Osage Agency looked after the leasing of the lands and collected the rentals thereon; that George Pitts executed the leases covering the land when requested by department officials to do so, but did not receive payment of any rentals as administrator; that the value of the land involved in this action and the rental collected by the Osage Indian Agency thereon were not included in computing his fee for services as administrator of the estate.

VI

That it has been the *practise* of the Superintendent of the Osage Indian Agency since the effective date of the Act of

[fol. 56] Congress of July 8, 1940, to execute agricultural leases on behalf of the heirs of deceased Osage Indians.

VII

That on July 12, 1937, George Pitts executed a mortgage to the defendant Fred G. Drummond covering the land involved in this action as security for the payment of indebtedness in the sum of \$2,500; that such mortgage was not approved by the Secretary of the Interior.

VIII

That on October 24, 1939, Fred G. Drummond instituted an action in the District Court of Osage County, Oklahoma, against George Pitts to recover judgment for the amount of such indebtedness and for a foreclosure of the mortgage lien; that on February 9, 1940, a judgment was entered by the District Court of Osage County in favor of Fred G. Drummond against George Pitts for the amount of such indebtedness and decreeing foreclosure of the mortgage covering the land involved in this action; that on appeal such judgment was affirmed by the Supreme Court of Oklahoma on May 6, 1941, (Pitts vs. Drummond, 189 Okla. 574, 118 P. (2) 244); that writ of certiorari was denied by the Supreme Court of the United States on March 2, 1942, (315 U. S. 814).

IX

That George Pitts was represented in such litigation by Ralph A. Barney, a member of the firm of McDonald, Files & Barney, Pawhuska, Oklahoma; that the employment of Mr. Barney was approved by the Secretary of the Interior; that the Secretary of the Interior authorized the appeal by George Pitts from the District Court of Osage County to the Supreme Court of Oklahoma and approved the supersedeas bond executed in connection with such appeal; that the Secretary of the Interior authorized and approved the application to the Supreme Court of the United States for a writ of certiorari; that the Secretary of the Interior authorized and approved payment of expenses, including attorney's fee, in connection with the litigation, and such expenses were paid from the funds of George Pitts held by the Osage Indian Agency; that the United States was not [fol. 57] a party to such litigation and counsel for George

Pitts was not authorized to appear for or represent the United States.

X

That the same questions of fact and law now presented to the court in this action by the United States were presented to the District Court of Osage County, Oklahoma, and to the Supreme Court of Oklahoma in the case of Pitts vs. Drummond, *supra*, by George Pitts, the defendant in that case. Questions of law raised therein by George Pitts and presented herein by the United States were decided adversely to George Pitts.

CONCLUSIONS OF LAW

I

The United States was not a party to the case of Pitts v. Drummond, *supra*, and is not bound by the judgment entered in that cause and is not barred by the doctrine of *res judicata* from maintaining this action. *Bowlind v. United States*, 223 U. S. 528; *Logan v. United States*, 10 Cir., 58 F. (2) 697.

II

At the time of the death of Mamie Fletcher Pitts, George Pitts held a certificate of competency and, by reason of Section 6 of the Act of April 18, 1912 (37 Stat. 86), the land involved in this action descended to him free of any restrictions against alienation. George Pitts was entitled to possession of such land immediately after the death of Mamie Fletcher Pitts. Since Mamie Fletcher Pitts was a full blood member of the Osage Tribe of Indians, the land was not subject to payment of any debts of her estate and the administrator of her estate was not entitled to possession thereof. As a general rule, land exempt from the payment of debts of deceased is not subject to administration in the probate courts of Oklahoma. It has been so held with respect to homesteads and with respect to restricted lands of the members of the Five Civilized Tribes of Indians. *Barnard v. Bilby*, 68 Okla. 63, 171 P. 444; *Cowokochee v. Chapman*, 90 Okla. 121, 215 F. 759; *Swain v. Hildebrand*, 169 Okla. 327, 36 P. (2) 942. But it is argued that a different rule obtains with respect to Osage Indians; that Section 3 of the Act of April 18, 1912, provides that the property of deceased allottees of the Osage Tribe shall be

subject in probate matters to the jurisdiction of the county courts of Oklahoma; that the statute should be construed as giving the county courts in probate matters jurisdiction of all property of deceased allottees of the Osage Tribe including restricted lands, and *Globe Indemnity Company v. Bruce*, 10 Cir., 81 F. (2) 143, is cited as authority. In that case, the deceased allottee was of less than one-half degree Indian blood and possessed a certificate of competency. Section 2 of the Act of February 27, 1925 (48 Stat. 1008) and Section 4 of the Act of March 2, 1929 (48 Stat. 1478) clearly disclose that it was not intended by Congress that the restricted lands of Osage Indians of one-half or more Indian blood, not having a certificate of competency, should be subject to administration in the probate courts of Oklahoma, or that the administrator of the estate of such Indians would be entitled to possession of such restricted lands. It follows that even if Section 7 of the Act of April 18, 1912 imposes limited restrictions upon land inherited by members of the Osage Tribe having a certificate of competency until such lands are turned over to such heirs, the statute has no application here for the reason that the lands were never in the possession of the administrator and could not have been "turned over" by George Pitts, the administrator, to George Pitts, the heir. It has been held that Section 7 does not apply to heirs of such deceased allottees who have certificates of competency or are not members of the tribe, but I find it difficult to follow the reasoning of those cases. *United States v. Mullendore*, D. Ct. N. Dist. of Okla., 30 F. Sup. 13; *Pitts v. Drummond*, 189 Okla. 574, 118 P. (2) 244.

III

It is further argued by the United States that Section 3 of the Act of February 27, 1925, imposed restrictions on the lands involved in this action. It is *suggested* that Section 3 should be interpreted as imposing restrictions upon all lands devised to and inherited by members of the Osage Tribe of more than one-half degree of blood having certificates of competency. The language used in Section 3 is not clear and free from ambiguity. A consideration of all of the legislation pertaining to the Osage Tribes of Indians [fol. 59] and consideration of the report to Congress of the Committee on Indian Affairs under date of March 5, 1924,

negatives any intent upon the part of Congress to impose restrictions on lands inherited by members of the Tribe having certificates of competency.

IV

The lands here under consideration were free from restrictions at the time the mortgage was executed by George Pitts to Fred G. Drummond, and the defendant Drummond acquired a valid lien against such land.

V

Judgment should be entered in this cause for the defendant.

Dated August 31, 1943.

Royce H. Savage, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Judgment—Filed Sept. 4, 1943

This matter coming on for hearing this 4th day of September, and the plaintiff appearing by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma, and the defendant appearing by his attorney Chas. R. Gray, and the Court being fully advised in the premises, and after having considered the evidence and the briefs filed by the parties to this action, finds the issues in favor of the defendant, as more particularly set out in the Findings of Fact and Conclusions of Law filed herein.

It Is Therefore Ordered, Adjudged, and Decreed, that plaintiff take nothing and that the defendant be discharged.

And It Is So Ordered.

Royce H. Savage, Judge.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Nov. 1, 1943

Notice Is Hereby Given that the United States of America, plaintiff herein, hereby appeals this case to the Circuit Court of Appeals for the Tenth Circuit from the judgment entered in this cause on the 4th day of September, 1943.

Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma, Attorney for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME—Filed Nov. 6, 1943

Now, on this 6th day of November, 1943, this matter coming on before the court on the application of the United States of America for additional time for the filing of the record in the Circuit Court of Appeals in the above-entitled case and it appearing to the court, for good cause shown, that said time should be granted.

It Is Therefore the Order of the Court that the United States of America be and it hereby is granted ninety (90) days additional time from November 1st, 1943, in which to file the record in the Circuit Court of Appeals in this cause of action.

And It Is So Ordered.

Royce H. Savage, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

STATEMENT OF POINTS ON APPEAL—Filed Jan. 3, 1944

Comes now the United States of America, appellant in the above-entitled case and specifies the following statement of points to be relied upon on appeal.

[fol. 61] 1. The District Court erred in concluding as a matter of law that the real estate involved in this action

at the time of the death of Mamie Fletcher Pitts descended to George Pitts free from any restrictions against alienation, pursuant to the Act of Congress of April 18, 1912 (37 Stat. 86).

2. The District Court erred in not holding that a mortgage given by a full-blood Osage Indian with a certificate of competency covering lands inherited from a full-blood Osage Indian without a certificate of competency after the decedent's death but before a final order of distribution and probate proceedings, is invalid under Section 7 of the Act of Congress of April 18, 1912 (37 Stat. 86).

3. The trial court erred in concluding as a matter of law that the real estate involved in this action was not restricted against alienation or encumbrance by virtue of the Act of Congress of February 27, 1925 (43 Stat. 1008).

4. The District Court erred in not holding that where real estate is inherited by a full-blood Osage Indian with a certificate of competency, the real estate is restricted against alienation or encumbrance by virtue of Section 3, of the Act of Congress of February 27, 1925 (43 Stat. 1008, 1010).

5. The District Court erred in concluding as a matter of law that the real estate involved in this action was free from restrictions at the time the mortgage was executed by George Pitts to Fred G. Drummond and that said mortgagee acquired a valid lien against the real estate.

Respectfully submitted,

Norman M. Littell, Assistant Attorney General. Whit
Y. Mauzy, United States Attorney.

I hereby certify that I have on this 3rd day of January, 1944, mailed a copy of the above statement of points on [fol. 62] appeal to the attorney for the defendant, Mr. Charles Gray, Pawhuska, Oklahoma.

Jo Neal.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DESIGNATION OF THE CONTENTS OF THE RECORD ON APPEAL—
Filed Jan. 3, 1944

Comes now the United States of America, appellant in the above-entitled cause and designates the following to be contained in the record on appeal:

1. Complaint of the United States filed April 29, 1942.
2. Defendant's Answer filed May 25, 1942.
3. Answer of the United States to defendant's request for admissions filed May 10, 1943.
4. Stipulation of facts, filed March 13, 1943.
5. Transcript of evidence of George Pitts, including inventory filed by him as administrator.
6. Findings of fact and conclusions of law of the Court filed September 4, 1943.
7. Journal Entry of judgment filed September 4, 1943.
8. Notice of appeal filed November 1, 1943.
9. Order extending time to file record in Circuit Court of Appeals filed November 6, 1943.
10. Certified list of docket entries.
11. Statement of points on which appellant relies.
12. This designation of the contents of the record on appeal.

Respectfully submitted,
Norman M. Littell, Assistant Attorney General. Whit
Y. Mauzy, United States Attorney.

I certify that I have this day mailed a copy of the above [fol. 63] designation to Charlie Gray, Pawhuska, Oklahoma, Attorney for defendant. This 3rd day of January, 1944.

Jo Neal.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL,
BY FRED G. DRUMMOND—Filed January 6, 1944

Comes now the defendant, Fred G. Drummond, the appellee in the above entitled cause, and designated the following to be contained in the record on appeal in addition to the parts of the record designated by the United States of America, the appellant:

1. Request of the defendant for admissions of the plaintiff under Rule 36 of the Federal Rules of Procedure filed on or about April 2, 1943.

2. Transcript of the evidence of Fred G. Drummond, including the offer of proof.

3. Transcript of the evidence of G. C. Thompson.

4. Transcript of oral stipulations entered into during the course of the trial.

5. Exhibits from the County Court of Osage County, Oklahoma, in the matter of the Administration of the estate of Mamie Fletcher Pitts, County Court Probate No. 4347, and stipulations, if any, concerning such exhibits.

6. Transcript of exhibits from case No. 17,234 in the District Court of Osage County, Oklahoma, wherein Fred G. Drummond was the plaintiff and George Pitts was the defendant, and transcript of oral stipulations concerning such exhibits, if any.

7. This designation of additional contents of the record on appeal by the defendant, Fred G. Drummond.

These additional parts of the record are believed necessary in order to enable the appellee to present to the appellate court the points in opposition to those on which appellant relies, and the further points raised by the appellee to the effect that the State Court final adjudication is binding upon the United States and that the United States cannot maintain this action.

Respectfully submitted, Chas. R. Gray, W. N. Palmer, Attorneys for Appellee, Fred G. Drummond.

Service and receipt of copy of the foregoing Designation acknowledged this 6th day of January, 1944.

Whit Y. Mauzy, United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

CLERK'S DOCKET ENTRIES

- Apr. 29, 1942 File Complaint.
File praecipe for summons—Issued.
- May 18, 1942 File Summons—returned served Fred G. Drummond personally at Hominy, Oklahoma, May 14, 1942.
- May 25, 1942 File Answer of Defendant.
- Aug. 14, 1942 Enter order cause set for Pre-trial Sep. 1, 1942.
- Sept. 1, 1942. Enter hearing on pre-trial conference—parties present by counsel—statements made—stipulations of facts to be filed—Briefs to be filed. (RHS-J)
- Mar. 13, 1943 File Stipulation.
- Apr. 2, 1943 File Defendants request for admissions under Rule 36 of Federal Rules.
File Brief of Defendant.
- Apr. 28, 1943 File & Enter Order granting pltf. an extension to May 8, 1943 in which to answer defendant's request for admissions. (RHS-J.)
- [fol. 65]
- May 8, 1943 Enter order granting pltf. an extension to May 10, 1943 in which to answer defendant's request for admissions. (RHS-J)
- May 10, 1943 File answer of U. S. to Defendant's Request for Admissions.
- June 1, 1943 Enter order cause set for trial at Tulsa, June 15, 1943. (RHS-J)
- June 10, 1943 File praecipe for *subpoea* on behalf of U. S. Geo. Pitts & G. B. Fulton—issued.
- June 10, 1943 File application for *subpoea* duces tecum.
- June 14, 1943 File U. S. sub. returned—Served G. B. Fulton & George Pitts at Pawhuska on 6-11 & 13 1943.
- June 15, 1943 Case called for trial—Parties present by counsel—announce ready—Witnesses sworn—Plaintiff's witnesses—Plaintiff Rests—Original Exhibits to be withdrawn and copies submitted—Defendant's witnesses—Defendant rests—Both sides rest—Plaintiff's witness G. C. Thompson recalled—Both

- sides rest—Arguments made—Decision taken under advisement — Defendant to file Reply Brief within 10 days. (RHS-J)
- June 23, 1943 File brief of plaintiff.
File brief for U. S.
File reply brief of deft.
- July 2, 1943 File Plaintiff's suggested Findings of Fact & Conclusions of Law.
- Aug. 26, 1943 File supplemental brief of defendant.
- Aug. 30, 1943 File requested Findings of Fact & Conclusions of Law by Deft.
- Sept. 4, 1943 File Findings of Fact and Conclusions of Law.
File & Enter J. E. that pltf. take nothing and that defendant be *discharges*. (RHS-J)
- [fol. 66]
- Nov. 1, 1943 File Notice of Appeal (copy mailed to Gray & Palmer, Pawhuska, Okla.)
- Nov. 6, 1943 File & Enter order extending time 90 days from 11-1-43 to docket appeal in CCA (RHS-J)
- Dec. 16, 1943 File praecipe for certified copy of all Docket Entries—Issued—.
- Jan. 3, 1944 File designation of the contents of record on appeal.
- Jan. 3, 1944 File Statement of Points on Appeal.
- Jan. 4, 1944 File Transcript of Testimony of George Pitts and portion of plts's exhibit No. 16.
- Jan. 6, 1944 File designation of additional contents of record on appeal by deft.
- Jan. 17, 1944 File Transcript of Evidence.

IN UNITED STATES DISTRICT COURT

Transcript of Evidence

" Be It Remembered, That on this 15th day of June, 1943, the above entitled and numbered cause came on for trial before the Honorable Royce H. Savage, United States District Judge for the Northern District of Oklahoma, at Tulsa, in said district, whereupon the following proceedings were had and done, to-wit:

Appearances: Mr. Whit Y. Mauzy, United States District Attorney for the Northern District of Oklahoma, At-

torney for the Plaintiff. Mr. Charles R. Gray, of Pawhusk Oklahoma, Attorney for the Defendant.

• • • • •
GEORGE PITTS, called as a witness on behalf of the plaintiff, and being first duly sworn and examined at the time and place above mentioned, testified as follows:

Direct Examination.

By Mr. Mauzy:

Q. State your name, please sir?

[fol. 67] A. George Pitts.

Q. You inherited certain land from Mamie Fletcher Pitts your wife, did you not?

A. Yes, sir.

Q. When did you take possession of the land you inherited from Mamie?

Mr. Gray: Objected to as calling for a conclusion of the witness.

The Court: Objection overruled.

Mr. Gray: Exception.

A. In 1939.

By Mr. Mauzy:

Q. In 1939. That was after you made the mortgage to Mr. Drummond?

A. Yes, sir.

Mr. Mauzy: That is all.

The Court: Any questions?

Mr. Gray: Yes, sir.

Cross examination.

By Mr. Gray:

Q. George, what did you do when you took possession of those lands?

A. After 1939?

Q. Yes.

A. I didn't do anything.

Q. What did you do with them?

A. I leased them.

Q. You had leased them before that, hadn't you?

A. I don't think so. I don't remember it.

Q. You don't remember?

A. No.

Q. You don't remember whether you ever leased them before 1939, do you?

A. No.

Q. But in 1939 you began to lease them, is that right?

A. Yes sir.

Q. Who leased them before that?

A. The Agency leased them, I suppose.

[fol. 68] Q. Well, the Agency leased them after that too, didn't they George?

A. I think so, but I leased them, I signed them.

Q. What you mean is you didn't sign the leases until 1939, is that right?

A. That is right.

Q. And before that the Superintendent of the Osage Agency leased them?

A. Yes sir.

Mr. Gray: That is all.

(Witness excused.)

G. C. THOMPSON, recalled as a witness on behalf of the plaintiff, and being duly examined at the time and place above mentioned, testified as follows:

* * * * *

Cross-examination.

By Mr. Gray:

Q. Mr. Thompson, you say you have been an employee of the Osage Agency for about twenty years?

A. Yes, sir, since 1920.

Q. Have you been connected with the Leasing Department during that time?

A. Not directly most of the time. May I make a statement in connection with that?

Q. Yes.

A. For the last nine years I have been Field Agent in charge of the sub-agency at Fairfax.

Q. Mr. Thompson, leases for Indians who are deceased that is full blood, non-certificate of competency Indians, are now being executed by the Superintendent of the Osage Agency, are they not?

A. Yes sir.

Q. And that has been the practice for a number of years, hasn't it, Mr. Thompson?

A. No, it just began a few months back.

Q. The rentals from these lands are collected by the Superintendent of the Osage Agency, are they not?

[fol. 69] A. They are.

Q. And they have been for several years back?

A. Yes sir, always, so far as I know.

Q. Even though the Administrator may have signed the lease he never collected the rent, did he, Mr. Thompson?

A. No.

Q. The rent was always collected by the Superintendent for the Osage Agency and went into the account of the deceased Indian?

A. Yes sir.

Q. And none of the rental on these leases was collected by George Pitts, was it?

A. No sir.

Q. It was all collected by the Superintendent of the Osage Agency?

A. That is right.

Mr. Gray: That is all.

.

FRED G. DRUMMOND, called as a witness on behalf of the defendant, and being first duly sworn and examined at the time and place above mentioned, testified as follows:

Direct examination.

By Mr. Gray:

Q. State your name, please?

A. Fred G. Drummond.

Q. You are the defendant in this action, Mr. Drummond?

A. I am.

Q. And you brought the suit in the State Court to foreclose the mortgage given to you by George Pitts on the land which he had inherited from Mamie Pitts?

A. Yes sir.

Q. Prior to the time of bringing that suit in the State Court, Mr. Drummond, did you have a conversation with George Pitts relative to the payment of that indebtedness?

A. I did.

Q. About when were they, and tell the substance of those conversations?

[fol. 70] Mr. Mauzy: We object as incompetent, irrelevant and immaterial, and not binding upon the United States.

The Court: I don't believe that is material, Mr. Gray.

Mr. Gray: My purpose in asking these questions, Your Honor, is to show that George Pitts was always ready and willing to pay this obligation, and it was in fact the Government that declined the payment and brought about the litigation, and forced the litigation through the State Court. That is the purpose of this testimony.

The Court: Yes, I understand that, but I don't think that makes any difference.

Mr. Gray: Very well, Your Honor.

The defendant offers to prove, and states the witness will testify, if permitted, that prior to the time of bringing the suit in the State Court he did have several conversations with George Pitts with reference to this indebtedness, and that George Pitts told him that he was desirous of paying the indebtedness, and procuring its payment through the Department of the Interior, and that at the time the revocation of his certificate of competency was discussed with Departmental officials in Washington he was told that the Drummond mortgage was not valid, and that he did not have to pay it if he didn't want to, or that in substance, and that he informed them that he wanted to pay that indebtedness, and desired to have it paid out of his income, and that thereafter there was a meeting of creditors held at the Osage Agency when all of the creditors of George Pitts were invited to come in and discuss with Osage Agency officials the claims against George Pitts; that the witness was present at that time, and that the offer made to the creditors was to pay twenty-five per cent of the amount of the indebtedness owing, and that the witness rejected

that offer and brought the suit to foreclose his mortgage. We will make that offer.

Mr. Mauzy: Same objection, Your Honor please.

The Court: Objection sustained.

Mr. Gray: Exception.

[fol. 71] That is all.

(Witness excused.)

STATEMENT ETC. AS TO COUNTY COURT FILES

Mr. Gray: Now, Your Honor, I have here the County Court files in the administration of the estate of Mamie Pitts, and I don't desire to offer them in evidence unless it is necessary, but I would like to make a statement as to what they show, and see if counsel will agree to that.

The files, including the reports of the Administrator, show that the Administrator never collects any rentals on any of the real estate belonging to the estate, and show no authority from the County Court to make or enter into any lease on any of the lands belonging to the estate, and further show that at the time of the hearing of the final report the Administrator was not allowed a commission on rentals, or a commission on the value of the real estate left by the decedent.

Mr. Mauzy: Your Honor please, I haven't checked those files and I am not in position to admit they show that, but I am agreeable that the files may be introduced, and the Agency will make a copy of them and submit them to the Reporter.

The Court: It should not be necessary to have the entire file in evidence. This is a case that will very likely be appealed.

Mr. Gray: The files will show that, but it will take an examination of all of them to show it.

The Court: In other words, unless some agreement be reached you have got to have everything in the files to show something wasn't there.

Mr. Mauzy: I am in this position, Your Honor, I have never seen them and I don't know.

The Court: Yes, I undersand. I suspect your associates will know.

Mr. Mauzy: I have asked Mr. Airington and he doesn't know, and Mr. Barney seems in the dark. Of course he

isn't an associate, but he is appearing here as a friend. [fol. 72] Mr. Gray: I have the final report right here. It will take a minute to look over it, and the order of court approving it, and it shows definitely he was not allowed any fees on the appraised value of any part of the estate. Of course you would have to check the files.

Mr. Mauzy: I would suggest these papers be introduced in evidence, Your Honor, please. They don't appear to be long.

Mr. Gray: If they won't agree I do want to offer them in evidence.

The Court: What is the general policy of the Agency in that respect?

Mr. Mauzy: I don't know, Your Honor please, I am frank to say. Mr. Fulton may be able to advise me, but I am grank to say I don't know.

Mr. Fulton: Well, the Agency would collect the rentals. Lease out the land through the Agency on those approved Government form leases, and they would turn them over to the Administrator to sign them, and then the Superintendent would approve them, and collect the money into the Agency and put the money in the estate, and frequently pay that money back to the general estate in payment of the ordinary expenses of administration. The rent money would go into the till of the estate and become part of the moneys of the estate, so it might have been paid back to them in that way.

The Court: I suspect you had better let the entire file go in, and then in the event of an appeal you could perhaps at that time stipulate what the files show.

Mr. Mauzy: Yes sir.

Mr. Gray: I think to save encumbering the record, Your Honor, I will just offer the final report and the order approving the final report as Defendant's Exhibits No. 1 and No. 2.

Mr. Mauzy: We object as incompetent, irrelevant and immaterial.

The Court: Overruled.

[fol. 73] Mr. Mauzy: Your Honor please, we would like to offer Plaintiff's Exhibits No. 12, No. 13 and No. 14. I notice a supplemental final account and supplemental order, and we would like to have those in too since the others are.

The Court: All right, they will be admitted.

Mr. Gray: I would like just this further thing, if counsel will stipulate with reference to it. That there was no order of the County Court ever made with reference to the leasing of land. Of course the only way we can show that is by showing an absence of any such order in the files. If counsel will look at the files sometime later, may be he will enter into it.

Mr. Mauzy: I notice these leases were all approved by the County Judge.

Mr. Gray: I say there was no order made by the County Court with reference to the leases.

Mr. Mauzy: I am not saying there are at this time, but I do notice they are approved by the County Judge.

Mr. Gray: Will you look through the files later and see whether they are?

Mr. Mauzy: Yes, I will be glad to.

The Court: Mr. Gray says the file does not reflect any order was ever made by the Judge approving the leases. I suggest you enter into that stipulation with the understanding, after you have had an opportunity to examine the files, Mr. Gray is mistaken, then you can reopen for the purpose of withdrawing your agreement or stipulation.

Mr. Mauzy: Yes, I will agree to that with this further statement; unless the approval of the County Court appearing on the various leases that have been introduced in evidence does amount to an order of approval.

The Court: Of course, by your stipulation though there is no order in the files made by the County Court, or revocation in the file made by the County Court. You don't contradict the evidence you have already introduced, which [fol. 74] shows on some of these leases executed by the Administrator that the County Court noted his approval.

Mr. Mauzy: That is correct.

The Court: What you referred to when you said there was no order in the file—

Mr. Gray: That is right, no document presented authorizing the Administrator to lease the lands, or have anything to do with the leasing of the lands. No order made.

The Court: Now is there any further evidence?

Mr. Gray: We have none, your Honor.

The Court: I will take a recess for about ten minutes, then I will hear your arguments.

(Thereupon the further hearing of this cause was recessed for about ten minutes, and when court resumed the following proceedings were had and done, to-wit:)

Mr. Gray: Your Honor, I would like to ask Mr. Thompson two or three more questions.

The Court: All right.

G. C. THOMPSON, recalled as a witness, and being duly examined at the time and place above mentioned, testified as follows:

Further Cross-examination.

By Mr. Gray:

Q. Mr. Thompson, you testified relative to the leasing of lands through the Osage Agency, and finally you said that for several months back the Superintendent of the Osage Agency had been signing leases for the heirs of the deceased Osage Indians, is that correct?

A. Yes, sir.

Q. Now prior to that time who signed the leases for the heirs of the deceased Osage Indians?

A. The custom was for years for the Administrator to sign such leases.

Q. Then after that time?

[fol. 75] A. Then as I recall for a few months back, then either the Superintendent could sign or Administrator could sign during a transition period, and the Superintendent signs all the leases now.

Q. For a time the Administrator signed them?

A. Yes, sir.

Q. Then either the Administrator or Superintendent signed?

A. Yes, sir.

Q. And now the Superintendent signs?

A. Yes, sir.

Q. I will ask you this: Isn't it a fact that the Osage Agency endeavors to look after all the leasing of all these lands belonging to the estates of deceased Osage Indians, and sees to the collection of the rents?

A. Yes, sir, it has been their duty to do that.

Q. And it has been done, is that correct?

A. Yes, sir.

Q. Now the Superintendent signs, Mr. Thompson, for the heirs of the deceased Indians, is that right?

A. That is right.

Q. That is the way he signs it?

A. It is so shown on the lease, Superintendent for the undetermined heirs.

Q. And was that the way the Administrator signed at the time he signed them, for the undetermined heirs?

A. No, it wasn't specified.

Q. Wasn't specified how he signed it?

A. Well, other than sign as Administrator for the estate.

Q. Mr. Thompson, these leases, who does the preparing of them usually?

A. They may be prepared by the force at the Agency, or by the lessee himself.

Q. They were not ever prepared by the Administrator and submitted in there. They were always prepared by the lessee or the Osage Agency?

A. So far as I know they were.

Q. That was the habit and custom?

A. Yes, sir.

Q. And the funds were always paid in on those leases to the Osage Agency?

[fol. 76] A. Yes, sir.

Mr. Gray: That is all.

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COLLOQUY

Mr. Gray: I would like the record to show that Mr. John L. Airington is appearing here now for Mr. R. A. Barney, Mr. Barney being in the armed services, and the record did show that Mr. Barney has a contract of employment approved by the Secretary of the Interior with George Pitts, and I would like the record also to show that Mr. Airington in behalf of Mr. Barney did appear here, and that he, or he and Mr. Barney together have submitted a typewritten brief to the court.

Mr. Mauzy: And let the record further show he is not appearing on behalf of the United States, and the brief is submitted *amicus curae*.

Mr. Gray: It might be a question as to how he appeared.

The Court: For whom do you appear, Mr. Airington?

Mr. Airington: I appear for R. A. Barney, Your Honor. And I want to say I have no employment by George Pitts, and as a matter of information to the court, I understand from Mr. Barney he has never received any fee for representing George Pitts in the State litigation.

The Court: You do appear?

Mr. Airington: Because of the fact I represent Mr. Barney.

The Court: You appear as pinch hitter for Mr. Barney, and Mr. Barney has requested you to appear because of his interest in this litigation as attorney for George Pitts, is that right?

Mr. Airington: That is true.

[fol. 77]

PLAINTIFF'S EXHIBIT No. 16

General Inventory and Appraisement

In the Matter of the Estate and Administration Mamie Fletcher Pitts, Osage Allottee No. 156. Deceased. In County Court.

An inventory of all the Estate, Real and Personal, of said Mamie Fletcher Pitts, deceased, that has come to the possession or knowledge of the undersigned, administrator of said estate.

Inventory

| Real Estate | App. Value |
|---|------------|
| Homestead: | |
| SW $\frac{1}{4}$ of NE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$, S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 26, Twp. 28 N., Range 6 E. I. M. | 2000.00 |
| Surplus: | |
| 1/2 Lots 3 and 4 and S $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 3, Twp. 24 N., Range 4 E. I. M. | 960.00 |
| W $\frac{1}{2}$ of SE $\frac{1}{4}$, W $\frac{1}{2}$ of E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 31, Twp. 26 N., Range 6 E. I. M. | 1600.00 |
| Lots 1 and 2 and S $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 1, Twp. 20 N., Range 10 E. I. M. | 960.00 |

| | Real Estate | App. Value |
|--|---|------------|
| Surplus: | | |
| | S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{2}$ and N $\frac{1}{2}$ of N $\frac{1}{2}$ of N $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 2, Twp. 20 N., Range 10, E. I. M. | 480.00 |
| Undivided One-Third Interest in and to | | |
| | SE $\frac{1}{4}$ of Section 2, Township 24 N., Range 4 E. I. M. | 800.00 |
| | and all of the NW $\frac{1}{4}$ of Sec. 32, Twp. 29 N., Range 6 E. I. M. | 2400.00 |
| | E $\frac{1}{2}$ of NE $\frac{1}{4}$ and SW $\frac{1}{4}$ of NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 33, Twp. 25 N., Range 4 E. I. M. | 960.00 |
| | SW $\frac{1}{4}$ of Section 1, and N $\frac{1}{2}$ of N $\frac{1}{2}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$, and | 960.00 |
| | N $\frac{1}{2}$ of S $\frac{1}{2}$ of N $\frac{1}{2}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 2, Twp. 20 N., Range 10 E. I. M. | 960.00 |
| | [fol. 78] N $\frac{1}{2}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 7, Twp. 23 N., Range 8 E. I. M. | 720.00 |
| | NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 23, Township 24 N., Range 8 E. I. M. | 1000.00 |
| | Lots 3, 4, and 5, and SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 6; and | 1600.00 |
| | N $\frac{1}{2}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 17, Township 21 N., Range 9 E. I. M. | 160.00 |
| | N $\frac{1}{2}$ of NE $\frac{1}{4}$, and | 400.00 |
| | N $\frac{1}{2}$ of NW $\frac{1}{4}$ of Section 28, Twp. 23 N., Range 6 E. I. M. | 1200.00 |
| | NE $\frac{1}{2}$ of SW $\frac{1}{4}$, and N $\frac{1}{2}$ of SE $\frac{1}{4}$ and SE $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 21, Twp. 23 N., Range 6 E. I. M. | 800.00 |
| | N $\frac{1}{2}$ of NE $\frac{1}{4}$, and SW $\frac{1}{4}$ of NE $\frac{1}{4}$, and NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 16, Township 23 N., Range 6 I. M. | 1600.00 |
| | Lots 6, 7, and 8 in Block 5, in the Tallchief Addition to the Town of Fairfax, Oklahoma | 1800.00 |

Undivided One-Sixth Interest in and To

Lots 2, 3 and 4 and SE $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec.

30, Twp. 24 N., Range 8 E. I. M.

106.66

Total

\$21,466.66

Dated this 10 day of November, 1937.

George Pitts, Administrator.

[Oaths of Administrators and Appraisers appear at this point in typewritten record.]

Certificate of Appraisers

We, the undersigned, Appraisers, do hereby certify that, after taking the foregoing oath by us subscribed, we appraised all the property described and mentioned in the above inventory, which has been exhibited to us, setting down opposite each item of said inventory, in figures, the value thereof in money, as by us determined.

A. F. Stephenson, O. L. Taylor, J. L. Duncan, Appraisers.

Witness our hands, this 22 day of November, A. D. 1937.

[Bill of Appraisers appears at this point in typewritten record.]

Filed Nov. 27, 1937. Sam Gilmore, Court Clerk. Service Accepted and copy received Nov. 27, 1937. C. L. Ellis, Supt. Osage Agency. By H. H.

DEFENDANT'S EXHIBIT No. 1

Final Account of Administrator. Checked with Carmen Gaddis 7-25-38 G. H.

State of Oklahoma, Osage County, ss. In the County Court of said County

To the Judge of said Court:

The undersigned, as the administrator of the estate of Mamie Fletcher Pitts, Osage Allottee No. 156, deceased, respectfully submits the following as a full and cor-

rect account and report of his administration as such administrator from date of appointment to the 30th day of June, 1938, which account exhibits not only the debts which have been paid, but also contains a statement of all the debts which have been presented and allowed during the period embraced in this account.

Administrator charges himself with the following, to-wit:

[fol. 80]

| Date | Items of Receipt | Amount | Total Amount |
|----------|---|----------|--------------|
| 1937 | | | |
| Aug. 13 | Osage Indian Agency—payment of claims..... | 1,500.58 | |
| Aug. 21 | Osage Indian Agency—family allowance..... | 100.00 | |
| Aug. 26 | Osage Indian Agency—court costs. | 24.60 | |
| Aug. 31 | Osage Indian Agency —Davis Bros. for labor on Storm Cave..... | 358.00 | |
| | Construction Dept. Osage Agency, storm cave..... | 14.32 | 372.32 |
| Sept. 16 | Osage Agency—for purchase of lands in connection with partition suit # 14571..... | 1,103.47 | |
| Sept. 27 | Osage Agency—C. F. Lake, Bond premium..... | 10.00 | |
| | Brown Motor Co. — claim..... | 6.76 | 16.76 |
| Nov. 1 | Osage Agency—family allowance. | 100.00 | |
| Nov. 5 | Osage Agency—ins. premium on Buick car..... | 87.68 | |
| Nov. 24 | Osage Agency—court costs..... | 12.70 | |
| Dec. 2 | Osage Agency—family allowance. | 100.00 | |
| Dec. 7 | Osage Agency payment of claims. | 586.35 | |
| Dec. 22 | Osage Agency—transcript fee.... | 15.50 | |
| Dec. 28 | Osage Agency — ins. prem. on property..... | 6.86 | |
| Dec. 28 | Osage Agency — family allowance | 100.00 | |

[fol. 81]

| 1938 | | | |
|---------|--|--------|-------|
| Jan. 8 | Osage Agency—appraisers' fees.. | 94.00 | |
| Jan. 13 | Osage Agency—repairs to pick-up. | 82.14 | |
| Jan. 29 | Osage Agency—family allowance. | 100.00 | |
| Feb. 17 | Osage Agency—license tags | 54.40 | |
| | Notary fee on license tags | 1.50 | 55.90 |
| Feb. 24 | Osage Agency—appraisers' fees—supplemental appraisalment.... | 11.00 | |

| | | |
|-----------|---|----------|
| Feb. 25 | Osage Agency—payment of claims | 106.33 |
| Feb. 26 | Osage Agency—partial distribution..... | 1,389.72 |
| Mar. 1 | Osage Agency—family allowance. | 100.00 |
| Mar. 17 | Osage Agency—ins. prem. on truck..... | 107.50 |
| | Court costs..... | 17.65 |
| Apr. 1 | Osage Agency—family allowance. | 125.15 |
| Apr. 29 | Osage Agency—insurance on Pickup..... | 100.00 |
| Apr. 30 | Osage Agency—family allowance. | 77.25 |
| May 5 | Osage Agency—payment of claim. | 100.00 |
| Aug. 12 | 1937, Osage Agency—for purchase of monument..... | 575.34 |
| Oct. 19 | 1937, Osage Agency—family allowance for five (5) months.... | 500.00 |
| [fol. 82] | | |
| Dec. 23 | 1937, Osage Agency—terazzo, slab for monument..... | 500.00 |
| May 27 | 1938, Osage Agency—partial Distribution..... | 135.00 |
| | | 4,900.00 |

Total amount of money received or collected..... \$13,078.65

DEFENDANT'S EXHIBIT No. 2

In the County Court of Osage County, Oklahoma, In the Matter of the Estate of Mamie Fletcher Pitts, Osage Allottee No. 156, Deceased. George Pitts, Administrator No. 4347.

Order Approving Final Report and Determination of Heirs.

• • • • •

The Court further finds that the report filed herein by the said administrator covers a period of time from the date of his appointment up to and including the 30th day of June, 1938, and that during said period of time the administrator has received the sum of \$13,078.65, and that all of said funds came to the said administrator out of the estate of Mamie Fletcher Pitts, which estate was in the hands of the Superintendent of the Osage Agency.

• • • • •

The court further finds that since the filing of said final report the said administrator has received the sum of \$1010.00 and has disbursed the same as follows:

| | |
|---|-------------------|
| To the Special Disbursing Agent of the Osage Agency, for the use and benefit of William Fletcher, | \$1,000.00 |
| To C. F. Lake, for bond premium, | 10.00 |
| Total | \$1,010.00 |

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The court further finds that the administrator, George Pitts, is entitled to the fees authorized by the statutes of Oklahoma on the sum of \$14,088.65, said fees amounting to [fols. 83-84] the sum of \$577.21, which amount is hereby allowed to the said administrator.

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Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION

Fourth Day, May Term, Thursday, May 25th, A. D. 1944.
Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Norman MacDonald, Esquire, appearing for appellant, Charles R. Gray, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Norman MacDonald, Attorney, Department of Justice (Norman M. Littell, Assistant Attorney General, and Whit Y. Mauzy, U. S. Attorney, were with him on the brief) for Appellant.

Chas. R. Gray (W. N. Palmer was with him on the brief) for Appellee.

Before Bratton, Huxman and Murrah, Circuit Judges

OPINION—August 1, 1944

HUXMAN, Circuit Judge, delivered the opinion of the court:

George Pitts and Mamie Pitts, husband and wife, were full blood Indian members of the Osage Tribe of Indians. No certificate of competency was ever issued to Mamie Pitts. Such a certificate was issued to George Pitts, July 11, 1910, and remained in full force until June 24, 1938, when it was revoked by the Secretary of the Interior. Mamie Pitts died intestate May 24, 1937, seized and possessed of real estate which included her allotment. George Pitts was appointed administrator of her estate by the proper county court. On September 9, 1938, the county court entered an order adjudging George Pitts to be her sole heir at law, and directed distribution of the estate to him. On July 12, 1937, George Pitts gave Fred G. Drummond a note for \$2,500, and secured it with a mortgage on the real estate [fol. 86] which he inherited from his wife. His certificate of competency was revoked shortly thereafter. The note was not paid, and Drummond instituted foreclosure proceedings on the mortgage in the state court. The government was not a party to that suit. Pitts was represented by an attorney of his own choosing. His employment was approved by the Secretary of the Interior, who also approved the expenses of that litigation, including attorneys' fees. The Secretary also approved an appeal to the Supreme Court of the State of Oklahoma, and an application for certiorari to the Supreme Court of the United States. The attorney in that litigation was, however, not authorized to appear for or represent the United States. The Supreme Court of Oklahoma upheld the validity of the mortgage and of the foreclosure proceedings. See *Pitts v. Drummond*, 118 P. 2d 244.

After the judgment of foreclosure in the state court became final, the United States government in its own behalf and in behalf of George Pitts, instituted this action to cancel the sheriff's deed and to quiet title. The government has appealed from a judgment denying the relief prayed for. It is the government's contention that the mortgage to Drum-

mond was void under Section 7 of the Act of April 18, 1912, because it was executed prior to the adjudication of heirship and order directing the distribution of the estate of Mamie Pitts to her heir, George Pitts, and that the mortgage was also void under Section 3 of the Act of February 27, 1925, because it was executed without the approval of the Secretary of the Interior.

The question in this case is identical with the one that was decided by the Supreme Court of Oklahoma in *Pitts v. Drummond*, *supra*. The Oklahoma Supreme Court in a large measure followed the decision by the United States District Court for the Northern District of Oklahoma in *United States v. Mullendore*, 30 F. Supp. 13. In the *Mullendore* case, the husband of the deceased Osage allottee was not a member of the Osage Tribe. Judge Kennamer held that the Act of April 18, 1912, applied to Osage allottees alone and to their Osage Indian heirs, but that it did not manifest an intent to protect non-members of the tribe. He held that where the heir was a non-member of the tribe, his right to alienate was controlled by Section 6 of the Act of [fol. 87] 1912, and that under it, all restrictions were removed as to non-Osage Indian heirs. He further held that if Section 7 did apply, the heir in that case had the right to alienate the inherited land, because at the time the mortgage was given, the land had actually been turned over to him, although no adjudication of heirship had been made.

The Oklahoma Supreme Court, as an additional reason for its decision, held that, assuming that Section 7 operated to reimpose restrictions upon the alienation of lands inherited by an Osage Indian having a certificate of competency until the final distribution of the estate by the county court, it did not apply in this case, because since the deceased was a full blood restricted Osage Indian, her lands were not subject to payment of debts and therefore were not subject to the control or jurisdiction of the probate court and that therefore there was no tribunal or person with power or authority to turn these lands over to the heir. This reasoning leads to the incongruous result that Congress intended to throw greater protection around unrestricted land inherited by an Osage Indian than around restricted land inherited by the same Indian.

Section 2(7) of the Osage Allotment Act of June 28, 1909, 34 Stat. 539, authorized the Secretary of the Interior

to issue certificates of competency to such Osage Indian allottees as he thought were competent to manage their own business affairs. A certificate of competency had the effect of removing restrictions from all allotted property except the homestead. It did not, however, remove restrictions from inherited lands. Under the Act of 1906, the inherited lands of an Indian having a certificate of competency became subject to all debts contracted prior to the issuance of such certificate.

Section 3 of the Act of 1912 conferred jurisdiction upon the Oklahoma courts having probate jurisdiction to administer estates of Osage Indian allottees and to determine heirship in such estates. Section 6 provided for partition by heirs of lands inherited from allottees and removed all restrictions against alienation of inherited lands of Osage Indians who had a certificate of competency. Section 7 protected the inherited property of Indians having a certificate of competency from debts contracted prior to the [fol. 88] receipt of the certificate of competency and against debts contracted prior to the time such lands were turned over to the Indian heir.

Section 6, read by itself, no doubt removes all restrictions against alienation of inherited lands by Osage Indians having a certificate of competency, but the answer to the problem cannot be found by considering Section 6 alone. Section 7 is also a part of the Act and must be considered together with Section 6. Congress had some purpose in mind when it included Section 7 in the Act, and these two sections should be so construed, if possible, as to give effect to both.

It is our conclusion that Section 7 reimposed limited restrictions on such property as was freed therefrom by the issuance of a certificate of competency under Section 6, to the extent that such property was protected against debts contracted prior to the issuance of the certificate, and also against debts contracted between the time of inheritance and the time the property was turned over to the heir.

In our opinion, the decision in this case does not depend upon whether lands of restricted Osage Indians are subject to the jurisdiction of the county court of Oklahoma, in the sense that it may administer such lands and subject them to the payment of debts. The question is, what did Congress intend when it passed Section 3 of the Act of

1912, providing that the property of Osage Indians should in probate matters be subject to the jurisdiction of the courts of Oklahoma? Section 3 evidences a Congressional intent to select the courts of Oklahoma having probate jurisdiction as a tribunal for the purpose of administering estates of Osage Indians and determining heirship.

Title 84, OSA 251, confers jurisdiction upon the county courts to settle estates of deceased persons, to hear and determine questions of fact as to heirship of such persons, and provides that such determination shall be conclusive in the absence of appeal. Title 58 OSA 251 provides that the executor or administrator must take into his possession the entire estate of the decedent, except the homestead and personal property not assets. Title 58 OSA 291 provides for turning over the real estate of the estate.

[fol. 89] The Oklahoma Supreme Court has held that the executor or administrator was entitled to the possession of all real and personal property, with certain exceptions, until the estate is settled and delivered to the heirs, *In re Gentry's Estate*, 13 P. 2d 156; that the property of one who dies intestate passes to the heirs subject to the control of the county court and to the possession of the administrator, *White House Lumber Co. v. Howard*, 286 P. 327; *Davis v. Morgan*, 95 P. 2d 856.

Oklahoma has uniformly held that jurisdiction of the estate of a deceased person is based upon residence and not upon the existence of assets, and that the existence of assets was not necessary to the appointment of an administrator.¹

The county courts of Oklahoma have full and complete jurisdiction over the estates of deceased persons, including the power to marshal assets for the payment of debts, determine heirship, the right to receive real and personal property and deliver the same to those who have been decreed to be the heirs and entitled thereto.

Congress no doubt had in mind the scope and breadth of the probate jurisdiction of Oklahoma courts when it enacted Section 3 of the Act of 1912. It recognized the neces-

¹ *Wolf v. Gills*, 219 P. 350; *Hardridge v. Hardridge*, 31 P. 2d 596; *Stock v. Sentinel Rural & Long Distance Tel. Co.*, 87 P. 2d 656; *Wolfe v. Graham*, 90 P. 2d 1067; *Griffin v. Hannan*, 93 P. 2d 1078.

sity of setting up machinery to determine heirship of Osage Indian allottees so that property could be delivered to those rightfully entitled to receive it. Judge Reeves interpreted the Act of 1912 as "a devolution by the Congress of judicial authority upon the county courts of Oklahoma to determine judicially, among other things, who were rightful claimants to the estate of deceased allottees of the Osage Indian Tribe. It was more than a mere selection of the county court for the performance of a ministerial or executive duty. It involved, as Congress must have intended, a judicial inquiry." *Mudd v. Perry*, 25 F. 2d 85, 87.

2 It is our conclusion that by Section 3 of the Act of April 18, 1912, Congress subjected the estates of all Osage Indian allottees, whether the same consisted of restricted or unrestricted lands, to the jurisdiction of the county courts of Oklahoma for the purpose of administration. Adjudication of heirship is a step in the administration of an estate. The county court had jurisdiction of Mamie Pitts' estate for the purpose of adjudicating heirship. It took jurisdiction of the estate, adjudicated the heirship, and entered an order directing the delivery of the estate to Pitts.

It is true that the title to real estate vests in the heirs upon the death of the testator, but it is not absolute until heirship is determined and an order of distribution is made. Where real estate of an Osage allottee is unrestricted, the heir, while being the owner thereof, is not entitled to its possession until all debts are satisfied and an order is entered directing the distribution of the property to him. Where the property is restricted, he is not entitled to receive it until his title has been legally adjudicated by an order of the court determining heirship and directing its distribution to him.

The debt for which the Drummond mortgage was given was contracted prior to the order adjudicating heirship and directing the distribution of the estate to Pitts. It follows, from what has been said, that the inherited real estate was not subject to the payment of this debt and that the mortgage given to secure its payment was void.

The conclusion we have reached makes unnecessary a consideration of the government's contention that the mortgage was void under Section 3 of the Act of February 27,

1925, because it was executed without the approval of the Secretary of the Interior.

Reversed and remanded, with directions to proceed in conformity with the views expressed herein.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT

Thirty-ninth Day, May Term, Tuesday, August 1st, A. D. 1944. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

[fols. 91-92] This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court.

[fols. 93-118] Petition for Rehearing covering 24 pages omitted from this print. It was denied, and nothing more by order of Aug. 28, 1944.

[fols. 119-120] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING

Fiftieth Day, May Term, Monday, August 28th, A. D. 1944. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein.

On consideration whereof, it is now here ordered that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE

Second Day, September Term, Wednesday, September 6th, A. D. 1944. Before Honorable Orie L. Phillips and Honorable Sam G. Bratton, Circuit Judges.

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 121] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Roy St. Lewis. File No. 48,973, U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 520. Fred G. Drummond, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 30, 1944. Term No. 520 O. T. 1944.